Office-Supreme Court, U.S.
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80-1452

No. ....
IN THE

Supreme Court of the United States

October Term, 1980

SAHARA-TAHOE CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, and HOTEL, MOTEL, RESTAURANT EMPLOYEES AND BARTENDERS UNION LOCAL 86, HOTEL AND RESTAURANT EMPLOYEES and BARTENDERS INTERNATIONAL UNION, AFL-CIO,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR A WRIT OF CERTIORARI.

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Questions Presented.

1. Whether an employer should be required to supply *unequivocal proof* of actual loss of union majority status to establish a good faith doubt sufficient to rebut the presumption of continuing union majority?
2. Whether the Ninth Circuit failed to exercise its function as a reviewing court by deferring to the National Labor Relations Board's elevation of stable bargaining relationships over employee free choice, in violation of public policy and the protected rights of employees and employers under the National Labor Relations Act?

Parties Appearing Before the Ninth Circuit Court of Appeals.

Petitioner Sahara-Tahoe Corporation[1] was the petitioner before the Court of Appeals for the Ninth Circuit, and was the respondent before the National Labor Relations Board. Respondent National Labor Relations Board was the respondent in the Court of Appeals. Respondent Hotel, Motel, Restaurant Employees and Bartenders Union Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO was an intervenor before the Court of Appeals, and was the charging party before the National Labor Relations Board.

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[1]Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel, is a wholly owned subsidiary of the Sahara-Nevada Corporation, which in turn is a wholly owned subsidiary of the Del E. Webb Corporation. Del E. Webb Corporation has the following subsidiaries (not wholly owned) and affiliates:

Bell Plaza Shopping Centers, Inc.
Bullfrog Marina, Inc.
Del E. Webb Development Co.
Oak Brook Development Co.
Sun City Title Co.
Sunland Memorial Park, Inc.
Sun State Insulation Co., Inc.
Webb-Centrio
Webb-University-Truckee
Webb-University-Tucson

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on November 28, 1980 in Case No. 79-7152.

Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit was entered on November 28, 1980. It is not officially reported as of the date of this Petition. The Decision and Order of the National Labor Relations Board is reported at 241 NLRB No. 12 and the decision of the Administrative Law Judge is appended thereto. All of the aforementioned decisions appear in the Appendix hereto.

Jurisdiction.

This petition for writ of certiorari is filed within ninety days from November 28, 1980, the date judgment was entered upon the Opinion of the Ninth Circuit Court of Appeals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Statutory Provisions Involved.

United States Code, Title 29.

§157 *Rights of employees*

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§158 *Unfair labor practices*

(a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . .

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

§159 *Representatives and Elections*

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

. . . .

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; . . .

. . . .

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought . . .

Statement of the Case.

Prior to August 2, 1974, Sahara-Tahoe Corporation d/b/a Sahara-Tahoe Hotel (hereafter "Hotel") was a member of a multiemployer bargaining unit known as the Reno Employer's Council (hereafter "Council"). On May 13, 1970, the Hotel, Motel, Restaurant Employees and Bartenders Union Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO (hereafter

"Union") was certified as the collective bargaining representative of all employees employed by the Hotel in its hotel-service operations. Subsequent to 1970, the Hotel and the Union entered into two collective bargaining agreements, the first of which expired on November 30, 1973, and the second of which expired on November 30, 1976. The Council was the designated representative of the Hotel and other member employers for the sole purpose of negotiating the collective bargaining agreements which were then signed by the general manager of the Hotel. The Hotel withdrew from the Council on August 2, 1974.

Throughout the terms of the two collective bargaining agreements, the Union was largely inactive. During the first term no Union representative was designated and there were no grievances filed or other dealings between the Hotel and the Union. During the second term, no Union representative was designated until April, 1975; the Hotel increased wages and added job classifications without notice to or response from the Union; employees complained directly to Hotel management with respect to changes in terms and conditions of employment; only two written grievances were filed by the Union, neither of which were ever arbitrated; hotel-service unit employees crossed a picket line formed by the Union between November 1974 and September 1975 to protest the failure to reach a contract with respect to food and beverage employees represented by the Union in a different bargaining unit. The turnover rate in the hotel service unit was extremely high, averaging 300% per year in 1973, 1974 and 1975.

In June, 1974 Hotel representatives attended a meeting of the Council at which they learned that the Union was financially insolvent and might merge with Las Vegas locals; and that organizers from the Las Vegas Culinary Local Union were coming into the area to solicit Union membership. About that time a trusteeship was imposed on the Union. Shortly thereafter a representative of the Union re-

quested permission of Hotel management to solicit employees for Union membership or support on Hotel premises. The Union opened up an office in the area during the summer of 1974 and, in subsequent months through early 1976, meetings and visits were held by the Union solely to encourage employees to join and support the Union. The Union's office in the area was closed in June or July of 1976 without notice to the Hotel.

In late 1975, a unit employee inquired of Hotel management if there was some way of "getting out from under" the Union, and he was advised to contact the National Labor Relations Board (hereafter "Board"). In the fall of 1976 the employee prepared a petition to decertify the Union, obtained the requisite number of signatures to necessitate an election, and mailed the petition to the Board. The Board sent a letter to the employee stating that no election could be held since unfair labor practices had been filed by the Union against the Hotel. The employee wrote to the Board and resubmitted the petition, explaining that the dispute to which the Board referred concerned a different bargaining unit. The Board responded that the petition was now untimely and could not be refiled until after November 30, 1976. The employee apprised Hotel management of his efforts to file the decertification petition; that he had contacted 150 people (more than 50% of the unit) and none of them wanted the Union and/or wanted to withdraw from it; that many of the employees he spoke to were totally ignorant of the fact that they were represented by a union.

On September 27, 1976, the Hotel received a letter from the Union advising the Hotel of its desire to change and modify the contract for the period following November 30, 1976. On September 28, 1976, the Hotel sent a letter to the Union advising it of the Hotel's desire to "modify, amend or terminate" the contract. The Hotel received no further communication from the Union until November 29, 1976, the day before the contract was to expire, when the Hotel

received a letter from the Union along with its proposed Agreement. By letter dated December 16, 1976, the Hotel replied and expressed its doubt that the Union represented a majority of any employees at the Hotel in an appropriate bargaining unit, and declined to bargain.

Thereafter the Union filed an unfair labor practice charge against the Hotel based upon the Hotel's refusal to bargain with the Union. In April 1977 the Regional Director, Region 20, issued a complaint thereupon against the Hotel. In February 1978 the Administrative Law Judge (hereafter "ALJ") determined that the Hotel had violated the National Labor Relations Act [61 Stat. 136, 73 Stat. 519, 29 U.S.C. §15, *et seq.*, §§158(a)(1) and (5)] (hereafter "the Act") by refusing to bargain. The ALJ's finding was based upon a presumption that the Union continued to represent a majority of the Hotel's employees in the hotel-service unit arising from the certification election held more than six years earlier and the subsequent collective bargaining agreements. The ALJ, after a separate analysis of each objective consideration, concluded that the Hotel had failed to show that it had a reasonable doubt based upon objective considerations that the Union did not enjoy majority support at the time recognition was withdrawn.

The Board, in March 1979, issued its decision and order affirming the decision of the ALJ, noting that "the employee petition here is a slender thread which, by itself, is an inadequate consideration to support a good faith doubt." (Appendix, p. 8). In November 1980 the Court of Appeals for the Ninth Circuit enforced the Board's decision and order holding that the Hotel had failed to meet the "good faith reasonable doubt" rebuttal standard since "[t]he petition relied upon by the employer did not, by itself or together with the other evidence presented, unequivocally indicate that the union support had declined to a minority." (Appendix, p. 6).

REASONS FOR GRANTING THE WRIT.

I

Introduction.

This case presents a fundamental issue which is ripe for review by this Court in order to guide the Board and Federal courts in the application of the presumption of continuing majority support for a once-certified union.

> "For many years, the Board has judged the legality of an employer's withdrawal of recognition from an incumbent Union by making a case-by-case determination whether the employer's asserted doubt as to the Union's majority status is in good faith and is supported by substantial objective evidence.
>
> The problem with this case-by-case approach is that both the employer and the Union are subject to the shifting views of the members of the Board and the courts as to what evidence is sufficiently 'objective' and convincing to demonstrate a good faith doubt."
>
> . . . .
>
> ". . . [A] clearcut, objective standard governing the conditions under which an employer will be permitted to challenge a Union's status would seem preferable to the present procedures and standards which leave both the Company and the Union in the dark as to when a challenge can be made, often require years to resolve, and run a substantial risk of frustrating actual employee wishes simply because the Board is not satisfied with the Company's ability to identify and articulate the reasons for its doubt about the Union's support." *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 43-44 (D.C. Cir. 1980).

Accord, NLRB v. Silver Spur Casino, 623 F.2d 571, 581 (9th Cir. 1980), petition for certiorari filed No. 80-660 (October 11, 1980) ("This issue involves an important and difficult question which is of current national interest in the labor relations field"). In *Brooks v. NLRB*, 348 U.S. 96 (1954), this Court upheld the Board's rule that the presumption of union majority is irrebuttable for the one-year period following certification. The opinion by Justice Frank-

furter also cited with approval the Board rule, enunciated in *Celanese Corp. of America*, 95 NLRB 664 (1951), "that one year after certification the employer can ask for an election or, *if he has fair doubts about the union's continuing majority, he may refuse to bargain further with it.*" 348 U.S. at 104 (emphasis supplied). The Board and Courts of Appeals have held that after such period an employer may withdraw recognition from an incumbent union if it affirmatively establishes that, at the time of the withdrawal, either (1) the union no longer in fact enjoyed majority status, or (2) the employer's refusal to bargain was predicated on a reasonably grounded doubt as to the union's continued majority status, asserted in good faith, based upon objective considerations, and raised in a context free of employer unfair labor practices. *See, e.g., Stoner Rubber Co.*, 123 NLRB 1440 (1959); *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328 (6th Cir. 1973); *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542, 546 (7th Cir. 1970).

The Board has utilized this and other presumptions ostensibly to further the policy of industrial peace which this Court has recognized as an underlying purpose of the Act. *Brooks v. NLRB, supra.* In so doing, however, the Board has favored incumbent unions to the detriment of employee free choice, the ultimate right which the Act seeks to protect.

The Ninth Circuit acknowledged its deference to the Board's utilization of these presumptions in *NLRB v. Silver Spur Casino, supra,* 623 F.2d at 578. That court's effort to accommodate the Board's policy determination has, in several recent cases, including the case at bar, caused the Ninth Circuit to enunciate a new standard of proof to be applied to employers who refuse to bargain with an incumbent union based on a reasonable good faith doubt of union

majority status.[2] This novel theory, which requires an employer to provide evidence which "unequivocally indicates that the union no longer has the majority support of the employees," *Sahara-Tahoe Corp. v. NLRB, supra,* (Appendix, p. 7), is a departure from the Board's own standard and conflicts with the standards applied by the other circuit courts.

The standard which should be applied is not clear, as evidenced by the multitude of interpretations given by the various circuit courts and, in many cases, within the same circuit. *See, e.g., Peoples Gas System, Inc. v. NLRB, supra,* 629 F.2d at 43-44. The confusion surrounding this issue is not attributable to divergent fact situations, but rather to the lack of a uniform standard which can be applied in an even-handed manner. The confusion is heightened by the fact that the Board and some courts have applied a less rigorous standard of good faith doubt when facts concern an initial duty to bargain rather than the withdrawal of recognition from an incumbent union, or when the challenge to union majority status comes from a rival union or the employees themselves rather than the employer. *See, e.g., Upper Mississippi Towing Corp.,* 246 NLRB No. 41 (1979); *NLRB v. Frick Co.,* 423 F.2d 1327 (3d Cir. 1970). The Hotel submits that the Supreme Court must articulate the "clearcut objective standard" which this issue requires, and extricate it from the morass of conflicting theories and presumptions which now obscure its clear resolution.

The Ninth Circuit has recognized both the fundamental nature of this issue and the conflict which surrounds it.

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[2]*NLRB v. Tahoe Nugget, Inc., et al.,* 584 F.2d 293 (9th Cir. 1978), *cert. den.* 442 U.S. 921 (1979), *reh. den.* 444 U.S. 887 (1979); *Sahara-Tahoe Corp. v. NLRB,* 581 F.2d 767 (9th Cir. 1978), *cert. den.* 442 U.S. 917 (1979), *reh. den.* 444 U.S. 888 (1979); *NLRB v. Sierra Development Co.,* 604 F.2d 606 (9th Cir. 1979); *NLRB v. Cards Hotels, Inc.,* 604 F.2d 605 (9th Cir. 1979); *NLRB v. Silver Spur Casino, supra; Sahara-Tahoe Corp. v. NLRB,* (9th Cir. 1980) ___ F.2d ___, 90 CCH LC ¶12,399, 105 LRRM 3421.

NLRB v. Silver Spur Casino, supra. It is the Hotel's position that the "unequivocal proof" standard applied by the Ninth Circuit to the facts herein was improper and excessive, in that it effectively requires actual proof of the union's loss of majority status to support the employer's good faith doubt, thereby eliminating reasonable doubt based upon objective considerations as an alternative for the employer. The court thus denies to this and other employers the ability to establish to the Board's satisfaction a good faith doubt of the union's majority, which is an integral component of its obligation to refrain from recognizing and bargaining with a minority representative as well as its defense to a charge of violation of Section 8(a)(5). While Section 8(a)(5) of the Act requires an employer to bargain in good faith with the majority representative of its employees, it is equally true that Section 8(a)(2) makes it an unfair labor practice for an employer to bargain with or otherwise support a minority union. The Ninth Circuit's decision ignores the employer's statutory duty to refrain from bargaining with a representative of less than a majority of its employees and makes it impossible for the employer to fulfill its independent responsibilities under the Act.

As the record below supports, the Hotel sustained its burden of proof under the proper standard, namely that all the factors presented by the Hotel were "objective, identifiable acts" which, taken together, and arising in a context free from unfair labor practices by the Hotel, provided the basis for a reasonable doubt of the Union's majority status. The Hotel contends that the Board and the Ninth Circuit, in the instant case, (1) by the application of a presumption of union majority support unjustifiable upon the record, (2) together with the *de facto* elimination of reasonable good faith doubt as a rebuttal standard available to the employer, have forced a bargaining obligation in violation of the principles and purposes of the Act. It is imperative that this Court correct this abuse, resolve the conflict among the

circuits, and restore the balance between stable bargaining relationships and employee free choice which the Act was intended to preserve.

II.

A Serious Conflict Exists Between the Ninth Circuit and Other Federal Courts of Appeal.

The Ninth Circuit, in its opinion in *NLRB v. Silver Spur Casino, supra*, recognized that the position taken by that court is in conflict with the positions taken by other circuits:

> ". . . [W]e recognize the force of [respondents'] contention that the Board has accorded too much weight to the presumption in these cases. This issue involves an important and difficult question which is of current national interest in the labor relations field. Respondents cite cases in other circuits which may have found the presumption rebutted upon similar or even weaker evidence than was presented in these cases." (Footnote listing citations omitted). 623 F.2d at 581.

The Ninth Circuit's application of the "unequivocal" proof standard in its recent decisions is a departure from the standard applied in other circuits in two crucial respects: first, it accords excessive weight to the Board-created presumption of continued union majority support by requiring an employer to produce evidence which "unequivocally" points to a loss of support for the union; and, second, it eliminates a cumulative assessment of the employer's evidence by requiring that at least one factor point unequivocally to a decline in majority status.

A. Evidence Raising a Serious Question Concerning Majority Status Will Support an Employer's Good Faith Doubt of Continued Union Majority Status.

The Ninth Circuit is the only court which requires an employer to come forward with evidence which "unequivocally indicates that employee support for the Union has declined to a minority" in order to support a good faith doubt of majority status of the union. In contrast, the other

circuits which have dealt with this issue permit an employer to refuse to bargain with an incumbent union based upon knowledge of factors which raise a serious question concerning union majority status. The Third Circuit requires the employer to "come forward with evidence casting 'serious doubt on the union's majority status' . . . What is required is a 'rational basis in fact.' " *NLRB v. Frick Co., supra*, 423 F.2d at 1331 (3d Cir. 1970). The standard articulated in *Frick* has been cited by the Seventh, Eighth and Tenth Circuits as well. *Ingress-Plastene, Inc. v. NLRB, supra*, 430 F.2d at 548 (7th Cir. 1970) (employer has the burden "to come forward with evidence casting serious doubt on the union's majority status"); *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1037 (8th Cir. 1976) (employer's evidence must have a " 'rational basis in fact' which casts a 'serious doubt' upon the Union's majority status"); *W & W Steel Co. v. NLRB*, 599 F.2d 934, 938 (10th Cir. 1979) (employer who doubts a union's majority "must show a rational basis in fact for the doubt").

The Fourth, Sixth and D.C. Circuits have adopted a standard wherein the refusal to bargain may be predicated upon a "reasonably grounded good faith doubt of majority support." *Terrell Machine Co. v. NLRB*, 427 F.2d 1088, 1090 (4th Cir. 1970); *Automated Business Systems v. NLRB*, 497 F.2d 262, 269 (6th Cir. 1974) (" 'an employer who has a reasonable basis in fact to doubt an incumbent union's majority status and who asserts that doubt in good faith may refuse to recognize and bargain with the union' "); *Machinists Lodges 1746 and 743 v. NLRB*, 416 F.2d 809, 812 (D.C. Cir. 1969), *cert. den.* 896 U.S. 1058 (1970) (the presumption "becomes rebuttable upon a showing of 'sufficient evidence to cast serious doubt on the union's continued majority status.' . . . The pertinent standard, 'serious doubt,' has two components: a reasonable basis in fact, and good faith").

The First, Second and Fifth Circuits have adopted standards under which, "in order to establish a good faith doubt the employer must present clear and convincing evidence of loss of union support capable of raising a reasonable doubt of the union's continuing majority." *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 489-490 (2d Cir. 1975); *NLRB v. West Sand and Gravel Co.*, 612 F.2d 1326, 1328 (1st Cir. 1979) (presumption may be rebutted "with clear and convincing evidence of lack of majority [or] with a showing of an objectively based good faith doubt that the union actually represented a majority of employees at the time recognition was withdrawn"); *J. Ray McDermott & Co., Inc. v. NLRB*, 571 F.2d 850, 858-859 (5th Cir. 1978), *cert. den.* 439 U.S. 893 (1978) (presumption "may be overcome by 'objective evidence proffered by an employer.'. . . there must be convincing evidence"). The Fifth Circuit also recognizes that "the employer need not conclusively demonstrate that a majority of his employees no longer desire to be represented by the Union" to establish a good faith doubt. *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720, 728-729 (5th Cir. 1978).

The General Counsel has the ultimate burden of proof with respect to the union's majority status. *See, e.g., Automated Business Systems v. NLRB, supra*, 497 F.2d at 270. Thus, courts dealing with this issue have uniformly held that upon

> "the employer's production of sufficient evidence to cast serious doubt [upon the union's majority] . . . the presumption then loses its force and the General Counsel must come forward with evidence that on the refusal to bargain date the union in fact did represent a majority of employees in the appropriate unit . . . or that the refusal to bargain was not predicated upon a good faith and reasonably grounded doubt of the union's continued majority status." *National Cash Register Co. v. NLRB*, 494 F.2d 189 (8th Cir. 1974).

Accord, Automated Business Systems v. NLRB, supra, 497 F.2d at 270 ("once sufficient evidence has been presented to cast a doubt on the continued majority status, the burden shifts to the General Counsel 'to prove that, on the critical date, the union in fact represented a majority of the employees.' [*Machinists*] *Lodges 1764 and 743, supra*, 416 F.2d at 812; *Allied Industrial Workers Local 289 v. NLRB*, 155 U.S. App. D.C. 112, 476 F.2d 868 (1973); *NLRB v. Frick Co.*, 423 F.2d 1327 (3d Cir. 1970)"); *W & W Steel Co. v. NLRB, supra*.[3] Moreover, the Eighth and Tenth Circuits have specifically recognized that "[A] Board created presumption does not rise to the level of 'substantial evidence.' " *National Car Rental System v. NLRB, supra*, 594 F.2d at 1207 (8th Cir. 1979); *W & W Steel Co. v. NLRB, supra*, 599 F.2d at 939 (quoting *National Car Rental System v. NLRB*); thus, if the employer produces evidence of a good faith doubt, the presumption will not sustain the General Counsel's burden of proof. *National Cash Register Co. v. NLRB, supra; Automated Business Systems v. NLRB, supra*.

B. The Cumulative Effect of Objective Factors Must Be Considered in Evaluating the Employer's Good Faith Doubt of Union Majority Status.

The vast majority of cases have required the employer to present evidence of objective factors which, when viewed together, support a serious doubt of majority status before the presumption will be deemed rebutted. The Board, for

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[3]Decisions of the Sixth and Eighth Circuits have held that, because the Board has the ultimate burden of proof to show actual union majority status, an employer who has a reasonably grounded belief that the union did not represent an uncoerced majority of its employees will not be guilty of an 8(a)(5) violation even if the General Counsel is able to prove that the union did in fact represent a majority of the employees at the time the employer refused to bargain. *NLRB v. Dayton Motels, Inc., supra; National Car Rental System v. NLRB*, 594 F.2d 1203 (8th Cir. 1979) (despite the presumption, the good faith doubt of majority status is a complete defense for the employer).

example, has in the past viewed the totality of factors relied upon by the employer, including such apparently subjective factors as the opinion of supervisors asked to "assess" union strength that the Union has lost its majority, in upholding a refusal to bargain. *Lloyd McKee Motors, Inc.*, 170 NLRB 1278 (1968); *see also, Viking Lithographers, Inc.*, 184 NLRB 139 (1970). On the other hand, courts have admonished the Board that it must not ignore elements which, standing alone, are insufficient to rebut the presumption but, when viewed in their totality, support an employer's reasonable good faith belief. *See, e.g., Bellwood General Hospital Inc. v. NLRB*, 627 F.2d 98 (7th Cir. 1980); *National Cash Register Co. v. NLRB, supra.*

Several courts have held that the Board's presumption of continued union majority status must be examined in the context of what actually took place, and will accord less weight to the presumption depending upon the circumstances. *NLRB v. Alvin J. Bart and Co., Inc.*, 598 F.2d 1267 (2d Cir. 1979) (election won by only one vote makes presumption "weak at best"); *NLRB v. Nu-Southern Dyeing & Finishing, Inc.*, 444 F.2d 11 (4th Cir. 1971) (election certifying union won by narrow margin combined with high turnover and other factors, rebuts the presumption). Likewise, the Fifth Circuit refused to view in isolation the fact that employees crossed picket lines, or that union membership had declined, and instead held that "resignation after crossing the picket line in a fairly acrimonious strike" was evidence of lack of union support; the reasonable doubt standard did not require conclusive proof. *NLRB v. Randle-Eastern Ambulance Service, Inc., supra,* 584 F.2d at 728.

The Seventh Circuit, in considering the cumulative impact of evidence presented by the employer, evaluated the entire record, including evidence against the Board's position as well as in favor of it, and concluded that the employer had come forward with evidence casting serious doubt on the union's majority status. *Ingress-Plastene, Inc.*

v. NLRB, supra. In *Star Manufacturing Co. v. NLRB,* 536 F.2d 1192 (7th Cir. 1976), the court again assessed the cumulative impact of factors relied on by an employer in refusing to bargain, holding that,

> "[T]o rebut that presumption [of continuing union majority] the employer need not prove that the union no longer represents a majority of the employees but only that at the time it refused to bargain there were sufficient objective considerations to support a reasonable doubt of the union's majority status." 536 F.2d at 1196.

In a recent decision the Seventh Circuit recognized that subjective evidence and a lack of other unfair labor practices committed by the employer may be used to bolster an employer's claim of reasonable good faith doubt. *Bellwood General Hospital, Inc. v. NLRB, supra.* The Eighth and Tenth Circuits specifically adopted the approach taken by the Seventh Circuit. *National Cash Register Co. v. NLRB, supra,* 494 F.2d at 195 (8th Cir. 1974) ("whether or not any one of the above factors would itself support an objective good faith doubt, it is not true that all reasons collectively would be insufficient," citing *Ingress-Plastene, Inc. v. NLRB, supra*); *Burns International Security Services, Inc. v. NLRB,* 567 F.2d 945, 949 (10th Cir. 1977) (employer's good faith doubt must be evaluated " 'in the light of totality of all the circumstances involved in a particular case,' " citing *Celanese Corp. of America, supra,* and *Ingress-Plastene, Inc. v. NLRB, supra*).

Evidence of employee dissatisfaction with the union, and particularly attempts to dissociate from the union, will normally be accorded great significance when relied upon by the employer.[4] Thus the Fifth Circuit held that,

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[4]The Eighth Circuit has adopted the position that a decertification petition signed by thirty percent of its employees will, by itself, relieve an employer of the duty to bargain pending the outcome of the decertification election. *National Cash Register Co. v. NLRB, supra.* The Board itself has held that a petition signed by thirty percent of bargaining unit employees raises a "question concerning representation" which suspends the employer's duty to bargain. *Telautograph Corp.,* 199 NLRB 892 (1972).

> "The kind of 'objective evidence' ordinarily sufficient to overcome a rebuttable presumption of majority support would be greater than fifty percent employee support for a decertification petition . . . *or thirty percent support for decertification with other indicia of nonsupport.*" *J. Ray McDermott & Co., Inc. v. NLRB, supra*, 571 F.2d at 859 (Emphasis supplied).

Accord, Automated Business Systems v. NLRB, supra (the filing of a decertification petition, together with information that a majority of the employees supported the decertification effort, was deemed sufficient evidence to support the employer's good faith doubt).

The Ninth Circuit purports to consider the cumulative impact of factors relied upon by employers to support reasonable good faith doubt:

> "After analyzing each [factor] individually, their combined effect is considered. . . . The Board has consistently held that no single equivocal factor is sufficient to sustain the good faith doubt defense, but that each will be accorded some weight when the total effect of the evidence is assessed." *NLRB v. Tahoe Nugget, Inc., supra*, 584 F.2d at 305.

However, the decision in the instant case makes clear the fact that the Ninth Circuit will not uphold the reasonable doubt defense in the absence of a factor or factors which "unequivocally indicate[s] that the union no longer has the majority support of the employees." The Ninth Circuit's requirement that at least one factor relied on by the employer point unequivocally to a decline in union support effectively negates the cumulative impact of the evidence, since it precludes the possibility that the cumulative impact of the evidence would be "unequivocal." This standard conflicts with earlier decisions in the Ninth Circuit; *see, e.g., Dalewood Rehabilitation Hospital, Inc. v. NLRB*, 566 F.2d 77 (9th Cir. 1977):

> "The courts require an assessment of the cumulative force of the combination of factors. *Royal Typewriter Company v. N.L.R.B.*, 533 F.2d 1030 (8th Cir. 1976);

> *Ingress-Plastene, Inc. v. N.L.R.B.*, 430 F.2d 542 (7th Cir. 1970). Even when each factor considered alone is insufficient for a good faith doubt of majority status, the combination may be adequate. *National Cash Register Company v. N.L.R.B.*, 494 F.2d 189, 195 (8th Cir. 1974).'' 566 F.2d at 80.

An examination of the Ninth Circuit's decision in the instant case reveals that the court dismissed the bulk of the Hotel's evidence without discussing it and without following the procedure which the court outlined for itself in either *NLRB v. Tahoe Nugget, Inc., supra*, or *Dalewood Rehab. Hospital, Inc. v. NLRB, supra*, relying instead on its decisions upholding the Board in the prior ''casino cases''[5] in which allegedly similar evidence was presented. The court then analyzes the additional evidence which the Hotel relied on, namely, the fact that bargaining unit employees failed to honor a picket line of a separate unit of employees within the same Union; the twice-frustrated attempt by Hotel employee Wolchow to file a decertification petition signed by more than thirty percent of employees in the bargaining unit; and information that over half the bargaining unit members were in favor of the petition. The Court discounted these objective considerations, citing the Board's view that,

> '' '. . . the employee petition here is a slender thread which, by itself, is an inadequate consideration to support a good faith doubt. . . . in absence [sic] of other probative evidence to support a doubt of majority.' '' Appendix, p. 6.

Thus, while the most recent Ninth Circuit cases claim to consider the cumulative impact of factors relied upon by the employer, the court continued to examine factors individually to determine if any of them unequivocally indicated a decline in union support; these factors were accorded only minimal weight when ''none of these factors pointed un-

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[5]See cases cited at note 2, *supra*.

equivocally to a decline in Union support among petitioner's employees." *Sahara-Tahoe Corp. v. NLRB, supra*, 581 F.2d at 771.

C. Conclusion.

In light of the obvious conflict between the Ninth Circuit and the other circuits mentioned over the proper rebuttal standard to be applied to an employer's evidence in support of its good faith doubt of an incumbent union's majority status, this Court should resolve the conflict by articulating a uniform and objective standard. The need for uniformity is even more compelling in view of the Ninth Circuit's own admission that the decisions in *W & W Steel Co. v. NLRB, supra, Ingress-Plastene, Inc. v. NLRB, supra*, and *Star Manufacturing Co. v. NLRB, supra*, "present factual situations in which other circuits may have found the presumption of majority support rebutted upon similar or weaker evidence than presented in these cases." *NLRB v. Silver Spur Casino, supra*, 623 F.2d at 581, fn 9. In defining the proper standard, this Court should balance the competing policies under the Act in order to eliminate the confusion over how much weight should be accorded to the presumption of continued majority status. These issues present recurring problems in the administration of the Act, the resolution of which should not be dependent upon the location of the circuit in which the problem arises.

III

The Standard of Proof Required by the Ninth Circuit Eliminates the Employer's Good Faith Doubt as a Basis for Refusal to Bargain.

A. The Requirement of Unequivocal Proof Exceeds Mere Objective Considerations or Reasonableness.

The Ninth Circuit has said that the presumption of union majority support is rebutted,

> ". . . if the employer shows, by clear, cogent and convincing evidence, that the union was in the minority

> or that the employer had a good faith reasonable doubt of majority support at the time of the refusal.'' *NLRB v. Tahoe Nugget, Inc., supra,* 584 F.2d at 297 (citing *NLRB v. Vegas Vic, Inc.*, 546 F.2d 828 (9th Cir. 1976), *cert. den.* 434 U.S. 818 (1977)).

In *Tahoe Nugget* and subsequent cases, however, the Ninth Circuit has imposed the additional requirement that at least one factor be ''clearly referable to a decline in union support.'' *Id.*, at 305. Thus, while the court in the case at bar claims to be considering the Hotel's evidence ''standing alone or cumulatively,'' the ultimate basis for upholding the Board's conclusion was that none of the evidence ''uniquivocally indicates that the union no longer has the majority support of the employees.'' Appendix, p. 7.

This is clearly not a case where the Ninth Circuit has simply endorsed the application of a well-established Board rule to particular facts; rather, the court has evaluated the Board's decision based on a newly-articulated rule, the scope of which far exceeds the criteria of ''objective considerations'' or ''reasonableness'' which the Board itself ostensibly applied to the Hotel's evidentiary showing. The term ''unequivocal'' is defined in *Webster's New Collegiate Dictionary,* G. & C. Merriam Co. (1976) as ''leaving no doubt.'' The requirement imposed by the Ninth Circuit is that, in order to support the employer's good faith doubt, the evidence must ''leave no doubt''; the only evidence which would ''leave no doubt'' of the union's lack of majority support would be actual proof beyond a reasonable doubt of such loss. Thus, the Ninth Circuit has clearly eliminated good faith doubt as a defense for the employer, since actual proof would be required in any event.[6]

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[6]The Board likewise applied an erroneous standard in this case, as is evidenced by the fact that the Board concluded the evidence presented by the Hotel was not entitled to substantial weight ''in the absence of other probative evidence to support a doubt of majority.'' Appendix, p. 8. It is clear that the Board required evidence which was probative with respect to actual majority status, rather than objective considerations which would reasonably give rise to a doubt of union majority status. By confusing the two standards whereby an employer can justify refusal to bargain, the Board has negated the effect of an employer's good faith reasonable doubt of the union's majority status by requiring the employer to supply *actual proof* to support the good faith doubt.

B. The Employer Is Generally Unable to Prove Actual Loss of Majority.

This Court has held that an employer who recognizes and bargains with a union which does not represent a majority of the bargaining unit employees, "thereby impressing that agent upon the nonconsenting majority" abridges the Section 7 rights of its employees. *ILGWU v. NLRB*, 366 U.S. 731, at 737 (1961). Furthermore, Section 8(a)(2) of the Act makes it an unfair labor practice for an employer to "support" any labor organization, thereby prohibiting an employer from granting exclusive recognition to a union which has only minority support. *ILGWU v. NLRB, supra*; *First National Maintenance Corp.*, 254 NLRB No. 28 (1981) (unlawful for an employer to execute a collective bargaining agreement if parties know that the union is not the majority representative). Thus, it is critical to the administration of the Act that an employer be able to rebut the presumption of continuing union majority in order to fulfill its independent duty under the Act to refrain from bargaining with or otherwise contributing support to a minority union. The origin of the good faith doubt defense as one means of rebutting the presumption of continued union majority status was a recognition by the Board and courts that "an employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity." *Stoner Rubber Co., supra,* quoted in *Automated Business Systems v. NLRB, supra,* 497 F.2d at 270; *NLRB v. Randle-Eastern Ambulance Service, Inc., supra*. Moreover, the union is itself in a far better position to prove its majority status than is the employer; the burden of proof of a fact of this type should rest with the person or party with the competence to prove the fact, which in this case is the union. *See, Automated Business Systems v. NLRB, supra; NLRB v. Laystrom Manu-*

facturing Co., 359 F.2d 799 (7th Cir. 1966); *NLRB v. Downtown Bakery Corp.*, 330 F.2d 921 (6th Cir. 1964).

Despite the practical impossibility of an employer establishing actual loss of majority support short of an election or an employee poll, this is exactly what the Ninth Circuit requires the employer to show under its "unequivocal proof" standard. The employer who has refused to bargain based on a reasonable doubt of the union's majority, when faced with the dilemma of supplying "unequivocal proof" to support the reasonable doubt, has the option of (1) polling employees to determine their support for the union, a procedure which courts have deemed to be "too coercive," *Retired Persons Pharmacy v. NLRB, supra*, 519 F.2d at 491; (2) petitioning the Board for an election, the holding of which would be blocked by the union filing unfair labor practice charges based on the refusal to bargain (thus rendering the filing of the election petition a futile act); or (3) presenting the objective factors upon which the good faith doubt is predicated, knowing that the Ninth Circuit will dismiss the evidence as "insubstantial."[7] Since the court has never indicated or suggested what type of evidence other than actual proof would "point unequivocally" to a loss of union majority, employers are left without guidance as to how the reasonable good faith doubt defense can be satis-

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[7]A fourth alternative would be for the employer to continue to recognize and bargain with the union while petitioning the Board for an election. Under those circumstances, the Board still requires that the employer, "in addition to showing the union's claim for continued recognition, must demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status since its certification." *U.S. Gypsum Co.*, 157 NLRB No. 60 (1966). Thus, by applying the same standard of proof to a request for election as a refusal to bargain, the Board renders the distinction meaningless; given the statutory duty of an employer to refrain from bargaining with a minority union, an employer with evidence sufficient by Board standards to request an election would be compelled to cease bargaining in order to avoid possible violations of Section 8(a)(1) and 8(a)(2) of the Act.

fied, particularly given the virtual impossibility of proving actual loss of majority.

The problem is exemplified by the court's statement at the end of its decision in this case that,

> ". . . by this decision, we do not imply that a petition which unambiguously indicated a desire not to be represented by the union and was signed by a substantial number of employees could not be considered by an employer in arriving at its good faith doubt, if that petition had not been filed with the Board." Appendix, p. 6.

Earlier in this decision, the court had deemed the employee petition an "insubstantial factor," *inter alia*, because it was signed by "barely 30 percent of the unit." Yet, in discussing decertification petitions, the court also stated that:

> "The Board has determined that a 'substantial number of employees' shall mean at least 30% of the employees within the bargaining unit. 29 CFR §101.18(a). This 30% showing can be made by the submission of a petition containing the signatures of at least 30% of the employees." Appendix, pp. 3-4.

Thus the court said that (1) the employer can consider a petition signed by a "substantial number" of unit employees as a factor supporting good faith doubt; (2) a "substantial number" of employees has been defined as thirty percent by the Board, yet; (3) notwithstanding the above, the Hotel in this case was *not* allowed to rely on a petition signed by thirty percent of the unit employees, because "the petition relied on by the employer did not, by itself or together with the other evidence presented, *unequivocally indicate that the union support had declined to a minority*." (emphasis supplied).

It is clear from the foregoing that the Ninth Circuit has promulgated a standard which precludes the employer from *ever* rebutting the presumption of union majority status by making inaccessible the evidence which would constitute "unequivocal" proof of employee lack of support for the

union. Such inequity and confusion must not be allowed to continue by this Court: a clearly articulated and evenhanded rule would further the ultimate goal of industrial peace by supplying employers with a standard against which their reasonable good faith doubt can be objectively and uniformly measured.

IV

The Ninth Circuit Failed to Perform Its Function as a Reviewing Court in Permitting the Board to Sacrifice Employee Free Choice for the Sake of Bargaining Stability in Violation of the Act.

The purpose of the presumption of continued majority support of a certified incumbent union is to deter frivolous challenges to union majority status which would undermine the right of employees to choose a bargaining representative. *Automated Business Systems v. NLRB, supra*, 497 F.2d at 270. This Court has recognized, however, that at some point the presumption of majority support might cease to reflect the preferences of employees, and so noted that once the initial certification year has passed, an employer who "... has fair doubts about the union's continuing majority, ... may refuse to bargain further with it." *Brooks v. NLRB, supra*, 348 U.S. at 104. Thus this Court has affirmed that the ultimate purpose of the Act, industrial peace, can only be furthered by insuring that the bargaining representative of employees continues to represent a majority of those unit employees. The Ninth Circuit, on the other hand, has articulated a new standard of rebuttal for employers attempting to justify refusal to bargain on the basis of a reasonable doubt defense which is impossible for employers to meet and thereby enshrines the incumbent union. Where the court allows the Board to apply the presumption of continuing majority support together with a rebuttal standard which precludes rebuttal, the court sanctions the Board's abuse of that discretion owed its administrative expertise and permits

the Board to engage in substantive lawmaking beyond its authority and also of a nature clearly contrary to the legislative directive contained in Section 7 of the Act.

A. Employers Have an Independent Duty Under the Act to Refrain From Bargaining With a Minority Representative.

A fundamental right guaranteed by the Act is the Section 7 right of employees "... to bargain collectively through representatives of their own choosing ... [or] to refrain [from such bargaining] ..." This Court expressed its concern for the principles of free choice and majority rule in the employee selection of bargaining representatives in its opinion in *NLRB v. Iron Workers Local 103*, 434 U.S. 335 (1978), as follows:

> " 'There could be no clearer abridgement of §7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity' than to grant 'exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority.' *Garment Workers v. NLRB*, 366 U.S. 731, 737, 6 L.Ed.2d 762, 81 S.Ct. 1603 (1961). This is true even though the employer and the union believe in good faith, but mistakenly, that the union has obtained majority support. 'To countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—*that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives.' Id.*, at 738-739, 6 L.Ed.2d 762, 81 S.Ct. 1603." 434 U.S. at 344. (Emphasis supplied).

This Court's construction of the federal labor statutes is clear. To permit a minority of employees to become the exclusive representative of all employees would not comport with the freedom of choice granted to employees under the Act to select a majority representative. Congress and this Court have thus given to employers a responsibility to insure

that they do not bargain with representatives of less than a majority of their employees.

The Ninth Circuit's decision, on the other hand, refuses to recognize the employer's independent responsibility in this regard:

> "[A]s we stated before, '[I]n refusing to bargain because of an alleged decline in union adherents, the employer is acting as vicarious champion of its employees, a role no one has asked it to assume.' *NLRB v. Tahoe Nugget,* 584 F.2d at 301." Appendix, p. 7.

The Ninth Circuit's position is thus in direct conflict with this Court's holdings in *ILGWU v. NLRB, supra,* and *NLRB v. Iron Workers Local 103, supra,* that an employer who recognizes and bargains with a minority union violates Sections 8(a)(1) and (2). The Ninth Circuit's standard for rebutting the presumption elevates bargaining stability over employee freedom of choice in a manner contrary to statutory intent: it assumes that representation by an incumbent union, even if that union no longer represents a majority of the employees, is preferable to no union representation, thus eviscerating the provision in Section 7 which guarantees an employee's right to refrain from bargaining activities, and it ignores the statutory proscription against an employer bargaining with a union that does not represent a majority of the unit employees.[8] To allow "minority rule" under these conditions, in the face of an employer's doubt of majority status supported by objective considerations, would not further bargaining stability or industrial peace.

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[8]The Ninth Circuit has held that the balance between bargaining stability and free choice is weighed differently when the employer is asserting the rights of its employees. *NLRB v. Tahoe Nugget, Inc., supra,* 584 F.2d at 302, fn. 31. The court would accord the presumption less weight in instances where employees are challenging the status of the union. Thus the Ninth Circuit, in deference to policy decisions of the Board, will uphold a presumption in the face of an employer's objective considerations which it would deem rebutted by the same evidence if offered by employees or a rival union, thereby placing an inequitable and unfair burden on the employer.

B. The Election Process Is the Favored Method to Effectuate Employee Free Choice.

The federal labor statutes make the secret ballot election the primary mechanism to maintain the critical tension between the often antithetical goals of democratic majoritarianism in employee selection of bargaining representatives on the one hand, and stability in bargaining relationships on the other. These goals are, of course, not strictly antithetical since industrial stability flows from the exercise of employee choice. Where a bargaining agent is imposed on employees against their will, the consequent dissatisfaction of employees will be expressed in ways which undermine industrial stability. As this Court noted, in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969):

> "The Board itself has recognized and continues to do so here, that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *Id.*, at 602.

When, as in the case at bar, the employer has refused to bargain with an incumbent union based upon a good faith doubt supported by objective factors from which the union's lack of majority status may reasonably be inferred, the union should be required to come forth with actual proof that it retains the support of a majority of the unit employees by agreeing to a Board-conducted election. *See, Automated Business Systems v. NLRB, supra.* The Board's routine utilization of the presumption of continuing majority support, together with the imposition of a calculatedly unmeetable rebuttal standard upon employers, results in the frequent insulation of incumbent unions from any duty to demonstrate continued majority support. The Ninth Circuit's deferral to this practice of the Board, which seriously frustrates the purposes of the Act and endangers peaceful labor relations, makes it imperative for this Court to rule on this aspect of the Board's administration of the Act.

The Hotel's belief that the Union had lost its majority status among these unit employees was buttressed by its knowledge that Wolchow had twice attempted to file a decertification petition with the Board, together with Wolchow's statements that a majority of the employees supported decertification. Great significance should be accorded to employee efforts to dissociate from the Union, particularly when, as here, they were accompanied by other factors indicating non-support. *J. Ray McDermott & Co., Inc. v. NLRB, supra.* In addition, the filing of this petition was thwarted by the Board's own actions in applying its procedural rules, which served only to confuse and discourage the employee decertification effort. Moreover, for the Hotel to have requested an election to resolve the disputed status of the union would have been a futile gesture, given the practices of the Board. Had the Hotel filed an election petition following its refusal to bargain, the unfair labor practice charge filed by the Union would have blocked the election, causing the Board to dismiss the Hotel's petition. This places an employer with evidence to support a good faith doubt of majority union support in an intolerable position.[9]

Given the futility of an employer's election request, it should be up to the union, rather than the employer, to request an election and resolve the issue of its majority status. Indeed, a union confident of its majority status would logically welcome the opportunity to prove its majority and avoid years of uncertainty and costly litigation. In fact, a union's refusal to demonstrate its continuing majority through an expeditious election, and an insistent reliance

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[9] "On one hand, the evidence might not be held to amount to adequate support for a good faith doubt; on the other hand, it might be an unfair labor practice for the employer to bargain with a minority union in light of the cumulative evidence indicating a loss of the Union's majority status, and yet it might also be an unfair labor practice for the employer to interview the employees regarding their preferences. We refuse, on the present record, to place this burden on the [employer]." *Bellwood General Hospital, Inc. v. NLRB, supra*, 627 F.2d at 104.

upon the presumptions obtaining in the much more protracted unfair labor practice proceedings, merit a suspicion that the union is not confident of its majority support and thus would be unable to come forward with evidence to prove its majority status. As the court stated in *NLRB v. Laystrom Mfg. Co., supra*:

> "Good faith is not a one-way street. The union's refusal, when challenged, to submit the issue to an election where each employee would be permitted in secrecy to make his choice, leads to the inescapable inference that it, too, was doubtful and fearful of the result. As the Trial Examiner stated:
>
> > 'and it is equally reasonable to speculate that a union may prefer to let the Board handle its hot chestnuts with tongs of technicalities instead of going to an election. A suspicion is not alien in the setting described above that perhaps the union doubts that it could win an election today.' "
>
> 359 F.2d at 801.

This suspicion is particularly warranted under the facts of the instant case, in which the General Counsel has relied exclusively on the Board-created presumption of majority support rather than come forward with proof of the Union's majority and where the record reveals a multitude of factors indicating that the Union lacks the support of a majority of the Hotel's employees.

Conclusion.

The decision of the Ninth Circuit in this case promulgates a new burden of proof which (1) requires an employer to shw unequivocally that a union does not represent a majority of its employees, (2) protects established bargaining representatives at the expense of employee freedom of choice and majority rule, thus raising a question of exceptional importance concerning the proper administration of the Act, and (3) conflicts with the law as applied in other circuits, thereby requiring the intervention of this Court to articulate a uniform rule.

For all the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated: February 25, 1981.

Respectfully submitted,

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APPENDIX.

Opinion.

In the United States Court of Appeals, for the Ninth Circuit.

Sahara-Tahoe Corporation, Petitioner, v. National Labor Relations Board, Respondent and Hotel, Motel, Restaurant Employees and Bartenders Union Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, Intervenor. No. 79-7152.

Filed: Nov. 28, 1980.

On Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board Argued and submitted June 12, 1980.
Before: ANDERSON, FERGUSON and NELSON, Circuit Judges. J. BLAINE ANDERSON, Circuit Judge:

The National Labor Relations Board (Board) found that Petitioner, Sahara-Tahoe Corporation, had committed unfair labor practices under 29 U.S.C. § 158(a)(5) and (1) by withdrawing recognition and refusing to bargain with the Union. Petitioner argues that its actions were justified because it had a good faith reasonable doubt that the Union represented a majority of the employees in the bargaining unit.

After a thorough evaluation of the record on appeal, we have determined that the Board's decision is supported by substantial evidence and we therefore enforce its order.
DISCUSSION

Refusal to bargain

Where an employer has been charged with a violation of 29 U.S.C. § 158(a)(5), refusal to bargain, the General Counsel must show that the union represented a majority of the employees in the unit at the time the employer refused to bargain with the union. *NLRB v. Tahoe Nugget, Inc.*, 584

F.2d 293 (9th Cir.), *cert. denied*, 442 U.S. 921, 61 L.Ed.2d 290, 99 S.Ct. 2847 (1979). In its attempt to meet this burden of proof, the General Counsel is assisted by a presumption of majority union support. "For a reasonable time, usually one year, after certification or voluntary recognition, majority support is irrebuttably presumed absent 'unusual circumstances.' After one year, the presumption becomes rebuttable." *Id.* at 297. Where sufficient proof to rebut the presumption is not presented by the employer, the presumption carries the General Counsel's burden of proof regarding the union's majority status. *Id.*

To rebut the presumption, an employer may show that it had a good faith reasonable doubt of the union's majority support at the time it refused to bargain. *NLRB v. Silver Spur Casino*, 623 F.2d 571, 577 (9th Cir. 1980). "If the presumption is deemed rebutted, then the General Counsel must come forward with evidence to satisfy its burden of proof regarding the union's majority status. *National Cash Register Co. v. NLRB*, 494 F.2d 189 (8th Cir. 1974)." *Id.* at 577. "Whether an employer has established a good faith reasonable doubt defense is a determination that must be made initially by the Board. The Board's decision will be upheld if it is supported by substantial evidence on the record as a whole." *Id.* at 579, *citing Sahara-Tahoe Corp. v. NLRB*, 581 F.2d 767, 771 (9th Cir.), *cert. denied*, 442 U.S. 917, 71 L.Ed.2d 284, 99 S.Ct. 2837 (1979).

In the prior "casino cases,"[1] some evidence was presented of employee discontent with the union, high employee turnover, low union membership, financial difficulties of the union, and a vigorous union membership drive.

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[1]See, *NLRB v. Tahoe Nugget; Sahara-Tahoe Corporation v. NLRB; NLRB v. Sierra Development Co.*, 604 F.2d 606 (9th Cir. 1979); *NLRB v. Carda Hotels*, 604 F.2d 605 (9th Cir. 1979); *NLRB v. Silver Spur Casino*,

However, we concurred with the Board's decision that the evidence, standing alone or cumulatively, presented only an ambiguous inference that the union had lost its majority support.

While Sahara-Tahoe presented similar evidence of employee discontent, high employee turnover, low union membership, financial difficulties of the union, and a vigorous union membership drive, Sahara-Tahoe argues that its additional evidence was sufficient to establish its good faith reasonable doubt. Sahara-Tahoe also presented evidence that bargaining unit members failed to honor a picket line of a separate unit of employees within the same union. The Board, however, deemed the crossing of the picket line to be only marginally relevant as the employer had not shown that the picket line had been instituted to create a work stoppage. The record supports the Board's conclusion.

More significantly, however, Saraha-Tahoe additionally showed that a petition which was captioned "Employees . . . who do not want to belong to any culinary union," was signed by more than 30% of the employees in the bargaining unit. Though the petition had not been accepted for filing by the Board, Sahara-Tahoe was aware of the existence of the petition prior to its refusal to bargain.

Petitions for Decertification

Employees may seek to decertify their bargaining representative by filing a petition with the Board alleging that a substantial number of employees assert that the union is no longer the representative of a majority of the employees within the unit. 29 U.S.C. § 159(c)(1)(A)(ii). The Board has determined that a "substantial number of employees" shall mean at least 30% of the employees within the bargaining unit. 29 CFR § 101.18(a). This 30% showing can

be made by the submission of a petition containing the signatures of at least 30% of the employees.

In *Telautograph Corporation*, 199 NLRB 892 (1972), the Board stated that where a decertification petition is timely filed by employees and there is no evidence of unfair labor practices that may have induced a decline in union support, the employer must discontinue bargaining with the incumbent union until the question of representation has been settled by the Board.[2] Thus, the filing of a decertification petition with the requisite 30% showing alone might justify an employer's refusal to bargain with the union. *National Cash Register Co. v. NLRB*, 494 F.2d 189 (8th Cir. 1974); *but see, Allied Industrial Workers, AFL-CIO Local Union No. 289 v. NLRB*, 476 F.2d 868, 881 (D.C. Cir. 1973).[3] In any event, evidence of a 30% support for decertification with other indicia of nonsupport for the union can establish an employer's good faith reasonable doubt of the union's majority status and justify its refusal to bargain. *J. Ray McDermott & Co., Inc. v. NLRB*, 571 F.2d 850, 859 (5th Cir.), *cert. denied*, 439 U.S. 893, 58 L.Ed.2d 238, 99 S.Ct. 250 (1978); *National Cash Register Co. v. NLRB*, 494 F.2d at 194; *see also, Pioneer Inn Associates v. NLRB*, 578 F.2d 835, 840 (9th Cir. 1978), and *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d at 305.

In the present situation, an employee in the bargaining unit, Wolchow, attempted to file a decertification petition

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[2]But see, *Lammert Industries*, 229 NLRB 895 (1977), where two members of the Board disavowed the statement in *Telautograph Corporation* that the filing of a decertification petition suspends an employer's bargaining obligation; two members felt that statement was still valid and the last member of the Board felt that it was unnecessary to rule on the continuing vitality of *Telautograph Corporation* at that time.

[3]However, it should be noted that *Allied* made no mention of *Telautograph Corporation* in deciding that a petition with only a 30% showing of support is an insufficient basis for refusing to bargain.

with the Board. The petition, however, was rejected. The letter Wolchow received from the Board stated that an election could not be held in the unit because unfair labor practice charges concerning that unit were pending before the Board. However, the unit that the Board's letter referred to was a different unit than which Wolchow's petition concerned. Wolchow explained the situation in a subsequent letter to the Board. But the Board then informed Wolchow that the petition was time barred until after the expiration of the contract on November 30, 1976.[4] Wolchow did not attempt to refile the petition after the expiration of the contract period.

There is no claim by Sahara-Tahoe that the petition should now be considered to have been filed when it was originally submitted by Wolchow. Thus Sahara-Tahoe does not contend that there was a timely filing of the petition such that under *Telautograph Corporation* it would have been justified in refusing to bargain with the union. Rather, Sahara-Tahoe contends that even though the petition was not actually filed, its knowledge of the petition, along with the other factors, establish that its refusal to bargain was based upon good faith reasonable doubt of the union's majority support. Its knowledge was that Wolchow had attempted to file the petition twice, but that the petition had been

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[4] "In order to stabilize the employer-union relationship the Board has established a 'contract bar' doctrine whereby a valid contract will ordinarily prevent the holding of an election for a certain period of time." C. MORRIS, THE DEVELOPING LABOR LAW, 167 (1971). Under this doctrine, employees have two periods in which to file a decertification petition. From 90 to 60 days before the end of the contract, called the open period, employees may file petitions to have a representation election. Also, after the termination of the contract, if no new contract is reached during the last 60 days of the contract, employees may petition for a representation election.

In this case, Wolchow's attempt to refile the petition that had been rejected earlier came after the open period and prior to the termination of the contract and it was thus deemed barred.

rejected both times on purely procedural grounds; in the course of rejecting the petitions, the Board at no time stated that the petition was defective in content or form; the petition had been signed by 83 employees; and it had been informed by Wolchow that approximately 70 more employees out of the 250-280 total bargaining unit members were also in favor of the petition though they did not wish to sign.

The Board, however, discounted the significance of the petition. The Board stated,

> "in our view, the employee petition here is a slender thread which, by itself, is an inadequate consideration to support a good faith doubt. The petition is signed by barely 30 percent of the unit; it is undated; the wording, as noted by the Administrative Law Judge does not unambiguously indicate a desire not to be represented by the Union; and although more than 2 weeks elapsed between the expiration of the last collective bargaining agreement and the Respondent's withdrawal of recognition, no attempt was made to refile the petition with the Board. We therefore cannot accord much weight to this insubstantial factor in absence of other probative evidence to support a doubt of majority."

241 NLRB No. 12 n.1.

We concur with the Board's conclusion under the facts of this case. The petition relied upon by the employer did not, by itself or together with the other evidence presented, unequivocally indicate that the union support had declined to a minority. However, by this decision, we do not imply that a petition which unambiguously indicated a desire not to be represented by the union and which was signed by a substantial number of employees could not be considered by an employer in arriving at its good faith doubt, if that petition had not been filed with the Board.

But, as we stated before, "[I]n refusing to bargain because of an alleged decline in union adherents, the employer is acting as vicarious champion of its employees, a role no one has asked it to assume." *NLRB v. Tahoe Nugget,* 584 F.2d at 301. Thus, before refusing to bargain with a union, an employer should have before it evidence which unequivocally indicates that the union no longer has the majority support of the employees. The evidence considered by Sahara-Tahoe did not justify its refusal to bargain.

The Board's order is ENFORCED.

Decision and Order.

United States of America, Before the National Labor Relations Board. 241 NLRB No. 12.

Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel and Hotel, Motel, Restaurant Employees & Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO. Case 32—CA—159, (Formerly 20—CA—12499).

On February 1, 1978, Administrative Law Judge James S. Jenson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the

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[1]Respondent places particular reliance on an employee petition as evidence of a loss of employee support for the Union, and therefore asserts that the evidence in this case is stronger than that in *Schara-Tahoe Hotel*, 229 NLRB 1094 (1977), enfd. 581 F.2d 767 (9th Cir. 1978), in which the Board found that Respondent did not have sufficient objective bases to support a good-faith doubt of the Union's majority status in a unit of kitchen and culinary employees. In our view, the employee petition here is a slender thread which, by itself, is an inadequate consideration to support a good-faith doubt. The petition is signed by barely 30 percent of the unit; it is undated; the wording, as noted by the Administrative Law Judge, does not unambiguously indicate a desire not to be represented by the Union; and, although more than 2 weeks elapsed between the expiration of the last collective-bargaining agreement and Respondent's withdrawal of recognition, no attempt was made to refile the petition with the Board. We therefore cannot accord much weight to this insubstantial factor in the absence of other probative evidence to support a doubt of majority.

Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel, Stateline, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. March 16, 1979

John A. Penello, Member

Betty Southard Murphy, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(Seal)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all parties had the opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice.

WE WILL NOT refuse or fail to do the following and WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize, and upon request, bargain with Hotel, Motel, Restaurant Employees & Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL—CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees and, if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purposes of collective bargaining is:

All employees employed by the Respondent in its hotel-service operations at its Stateline, Nevada operations, including housekeeping personnel; parking lot attendants; front desk employees; timekeepers; casino porters; and bellmen, excluding casino employees; bartenders and culinary workers; office clerical employees; carpenters; employees in the engineering department; warehouse employees; stage

hands; guards and supervisors as defined in the National Labor Relations Act.

SAHARA-TAHOE CORPORATION,
d/b/a SAHARA-TAHOE HOTEL,
(employer)

Dated .....
By (Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 2201 Broadway, Second Floor, P. O. Box 12983, Oakland, California 94604, Telephone 415—273—6122.

Decision.

United States of America, Before The National Labor Relations Board, Division of Judges, Branch Office, San Francisco, California.

Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel and Hotel, Motel, Restaurant Employees & Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO. Case No. 32-CA-159, (formerly 20-CA-12499).

Marcia Canning, of San Francisco, Calif., for the General Counsel. *Anthony T. Oliver, Jr.*, and *William H. Emer*, of Los Angeles, Calif., for the Respondent. *Howard Lawrence*, for the Charging Party.

Statement of the Case

JAMES S. JENSON, Administrative Law Judge: This case was tried before me in South Lake Tahoe, California on July 12 and 13, 1977. The complaint, which issued on April 15, 1977 pursuant to a charge filed on February 18, 1977, alleges that Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel, herein called Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. Admitting that it has withdrawn recognition and refused to bargain collectively with the Union, the Respondent contends such action was lawful on the ground that its belief that a majority of the employees no longer desired union representation was based upon objective considerations. All parties were given full opportunity to appear, to introduce evidence, examine and cross-examine witnesses, to argue orally and to file briefs. Extensive briefs have been filed by both the General Counsel and the Respondent and have been carefully considered.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is a Nevada Corporation with a place of business in Stateline, Nevada where it is engaged in the operation of a combination hotel, bar, restaurant, and gambling casino. During the year immediately preceding issuance of the complaint, Respondent, in the conduct of its business operations, received gross revenue in excess of $500,000 and purchased and received goods and materials valued in excess of $50,000 directly from outside the State of Nevada. The Respondent admits and I find that Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Background and Issue*

The Respondent operates a combination hotel, bar, restaurant and gambling casino in Stateline, Nevada, sometimes referred to as Lake Tahoe and South Lake Tahoe. At times material herein, Dietrich Mayring has been the Respondent's vice-president and general manager. Thomas Aro was the assistant manager, and Vesta Valentine has been the director of personnel. Al Bramlet was the union's international trustee, Howard Lawrence was the union's director of administration, Bobbi Swan was the union's business representative, as were Russ Robinson and Robert Weber. Joseph Coniglio and Peggy Wagner were employees on whose behalf the union filed grievances.

On May 13, 1970, the Union was certified as the collective-bargaining representative of all employees employed by the Respondent in its hotel-service operations at its Stateline, Nevada operations, including housekeeping personnel; parking lot attendants; front desk employees; timekeepers; casino porters; and bellmen, excluding casino employees; bartenders and culinary workers; office clerical employees; carpenters; employees in the engineering department; warehouse employees; stage hands; guards and supervisors as defined in the National Labor Relations Act. Thereafter, the parties entered into two successive collective-bargaining agreements covering the employees in the certified unit, the first expiring November 30, 1973 and the last on November 30, 1976. At the time both agreements were negotiated, the Respondent was a member of the Reno Employers Counsel;[1] however, both agreements were signed individually by the Respondent, and it is clear that the employees involved herein were not part of a multi-employer unit.[2]

By letter dated September 27, 1976, the Union notified the Respondent that it desired "to change and modify for the period following November 30, 1976 the terms and conditions of our current collective-bargaining agreement with you." By letter dated September 28, 1976, the Respondent advised the Union that it, too, desired to "modify, amend, or terminate" the agreement, and that it was willing to meet at a mutually agreeable date. There was no further

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[1]The Respondent resigned from the Reno Employers Counsel in August 1974.

[2]Paragraph VI of the complaint alleges the certified unit described herein as an appropriate unit. While the Respondent's answer denied the appropriateness of said unit, it failed to offer any evidence to rebut its appropriateness. Accordingly, it is found that the unit set forth above is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

communication between the parties regarding negotiations until the Union's letter of November 29, 1976 transmitting copies of its proposed agreement to the Respondent and asking that the Respondent advise it "of a date, time, and place convenient to you to begin contract negotiations." By letter dated December 16, 1976, the Respondent advised Howard Lawrence, the Union's director of administration, that ". . . we do not believe that your organization currently represents a majority of any employees and the Sahara-Tahoe Hotel in an appropriate bargaining unit. For this reason we respectfully decline your request to commence negotiations."

On February 18, 1977, the Union filed the charge initiating this proceeding. In a recent case involving the parties to this proceeding[3] the Board stated:

> It is well settled that tbe existence of a prior contract, lawful on its face, raises a dual presumption of majority — a presumption that the Union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract.[3] Following the expiration of the contract, the presumption continues and, though rebuttable, the burden of rebutting it rests on the party who would do so.[4] To withdraw recognition lawfully, either this presumption must be overcome by competent evidence that the Union in fact did not represent a majority at the time of the withdrawal,[5] or the Employer must establish on the basis of objective facts that it had a reasonable doubt as to the Union's continuing majority status. This latter test, which Respondent claims it meets, requires more than mere evidence

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[3]*Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel*, 229 NLRB No. 151, pending before the Court of Appeals for the Ninth Circuit on a petition for review and a cross application for enforcement.

of the Employer's subjective state of mind.[6] For the test to be met, the assertion must be supported by objective considerations; that is, some reasonable ground for believing that the Union has lost its majority status.[7]

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[3]*Shamrock Dairy, Inc., Shamrock Dairy of Phoenix, Inc., and Shamrock Milk Transport Co.*, 119 NLRB 998 (1957), and 124 NLRB 494 (1959), enfd. 280 F.2d 665 (C.A.D.C., 1960), cert. denied 364 U.S. 892. See also *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho*, 213 NLRB 651 (1974).

[4]*Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970), enforcement denied on other grounds *sub nom. N.L.R.B. v. Tragniew, Inc., and Consolidated Hotels of California*, 470 F.2d 669 (C.A. 9, 1972).

[5]No such evidence is present in this record.

[6]*Celanese Corporation of America*, 95 NLRB 664 (1951).

[7]*Laystrom Manufacturing Co.*, 151 NLRB 1482, 1483 (1965), enforcement denied 359 F.2d 799 (C.A. 7, 1966). See also *Emerson Manufacturing Company, Inc.*, 200 NLRB 148 (1972), and *Terrell Machine Company*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1084 (C.A. 4, 1970), cert. denied 398 U.S. 929.

As in the earlier case, the record herein does not disclose by competent evidence that the Union in fact did not represent a majority at the time of the withdrawal. Hence, the sole issue here is whether the Respondent had a reasonable doubt based upon objective considerations that the Union did not represent a majority of its hotel-service employees when it withdrew recognition and refused to bargain with the Union as the collective-bargaining representative of said employees on and after December 16, 1976.

B. *Sequence of Events*

1970

May 13 - Union certified by Board.

September 28 - First collective-bargaining agreement signed for term of 3 years. No grievances filed during term of contract.

1973

December 1 - Second collective-bargaining agreement signed for term ending midnight November 30, 1976.

1974

June 7 - Union placed under trusteeship.

July - Union opened office at South Lake Tahoe and commenced membership drive in both hotel service and food and beverage employee units.

August 2 - Respondent resigned from Reno Employer's Counsel.

September 16 - Respondent advised the Union that unless it objected by September 20, Respondent proposed to institute additional benefits for hotel-service employees, including additional holidays, increased sick pay and vacation benefits and one meal per 8-hour shift. The union did not respond to the letter and the changes were instituted.

September 19 - Letter from Respondent to Union objecting to paid organizers soliciting employees on the Respondent's premises to join the Union, and advising that supervisors had been instructed not to respond to requests for information from union representatives without the approval of the Respondent's vice-president and general manager.

October 1 - Letter from Respondent to union trustee regarding food and beverage unit matter, and calling attention to fact union representatives had made visits to hotel-service employees without giving advance notice to Respondent as required by Article III of the collective-bargaining agreement.[4]

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[4]Article III, entitled *Interviews*, reads:

> The Union will submit in writing the name of one (1) and an alternate Representative authorized to visit the Employer's premises during the period of this Agreement for the purpose of assisting in the administration of this contract. Whenever a visit to the Employer's premises is required, the Representative shall notify the Hotel Manager or his designated representative in advance of each visit. It is understood that said visits will be at such times and in such a manner as to least interfere with the performance of work by employees.

November 18 - Respondent advised the Union by letter that a group of hotel-service employees had requested Respondent pay overtime after 5 instead of 6 consecutive days worked, and that it therefore proposed to pay 1½ times after 40 hours per week and 2 times after 48 hours if the Union did not object. The Union did not respond to the letter and the change was instituted.[5]

November 30 - Food and beverage contract expired and Respondent refused to negotiate a new food and beverage agreement on ground it doubted the Union's majority status.[6] Union commenced picketing Respondent's premises and picketed until September 1975. The record fails to show whether any of the Respondent's employees engaged in a work stoppage or whether the picketing was directed at Respondent's customers. In any event, it does not appear that any of the Respondent's employees declined to cross the picket line.

1975

January - Dietrich Mayring became Respondent's vice-president and general manager.

February 14 - Union protested termination of Joseph Coniglio and requested that he be reinstated.

February 18 - Respondent letter to Union denying reinstatement of Coniglio.

February 22 - Union advised Respondent it intended to arbitrate Coniglio's discharge.[7]

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[5]Section 3 of Article V, entitled *Salaries*, provided:

> Nothing in this contract shall be interpreted to preclude the employer from giving employees an increase in the scale for any class, or individual class, during the period that this contract is in full force and effect.

[6]*Sahara-Tahoe Corporation, d/b/a Sahara Tahoe Hotel, supra.*

[7]On October 17, the Union's attorney advised Arbitrator Sam Kagel that he had been selected to arbitrate the Coniglio dispute. On December 17, the Respondent's attorney advised Mayring that the Union's attorney had received no response from Kagel regarding the matter. Lawrence testified that the matter was never arbitrated because Coniglio disappeared.

April 9 - In accordance with Article III of contract, Union advised Respondent by letter that Bobbi Swan was the Union's representative authorized to visit the Respondent's premises to enforce the agreement, and that Russ Robinson was the alternate representative.

April 11 - Letter from Mayring to Lawrence reminding him that Article III of the agreement provided that the designated representative notify the hotel manager in advance of each visit.

April 21 - Mayring letter advising Lawrence that soliciting membership in the Union is not within the purview of "administration" as used in the contract, and further advising that the Company had a long standing "no solicitation" rule, which the Respondent expected the authorized representative to abide by.

April 23 - Mayring letter to Lawrence confirming telephone conversation of that date wherein it was agreed that only one union representative at a time would be allowed on Respondent's premises to assist in administration of the contract, and that the visits would not be used to solicit membership in the Union.

Mid-year - Union commenced holding monthly meetings with hotel-service employees. In addition, informal meetings were held from time to time at coffee shops, bars, and the union hall.

October 17 - Letter from union attorney advising Arbitrator Sam Kagel that he had been selected to arbitrate the Coniglio grievance.

October 21 - Respondent's attorney advised Mayring that an arbitrator had been selected to hear the Coniglio grievance.

October 30 - Letter from Lawrence to Mayring requesting names, addresses and phone numbers of unit employees,

and for permission to post meeting notices on hotel premises.

November 5 - Letter from Mayring to Lawrence declining request for names, addresses and phone numbers of unit employees and for use of bulletin board to post notices of union meetings. Letter contains offer to meet to discuss alternatives to request.

November 11 - Letter from Lawrence to Mayring renewing request for names, addresses and telephone numbers of unit employees and for use of bulletin board.

November 14 - Letter from Lawrence to Mayring advising that pursuant to Article III of the contract, Swan would continue as the Union's representative authorized to enforce the agreement, and that Robert Weber was replacing Russ Robinson as the alternate representative.

November 18 - Letter from Mayring to Lawrence in response to the latter's November 11 letter, again declining to furnish names, addresses and telephone numbers of unit employees and denying use of bulletin board.

December 8 - Letter from Mayring to Lawrence wherein Mayring objected to the fact that when Swan visited the hotel premises, she solicited employees to attend union meetings. Letter advised, in pertinent part, that contract permitted visits by authorized representative "*only*, 'for the purpose of assisting in the administration of this contract.' In my opinion soliciting union membership or soliciting employees to attend union meetings is not within the purview of 'assisting in the administration' of the contract. . . . However, in view of her utter disregard for the contract, we now find it necessary to have your representative accompanied by a security guard until the purpose of her visit has been determined." Mayring issued instructions to security department to accompany Swan and to make written reports on her visits to the hotel.

December 10 - Letter from Lawrence to Mayring renewing for a second time the Union's request for the names, addresses and telephone numbers of unit employees. The letter states in pertinent part: "We need this information to administer our contract in the following areas. First, we have received reports that some unit employees are receiving a paid lunch and some are not. We wish to survey the employees to discover the extent of this practice. Second, the Union has received many inquires from unit employees concerning the amount and type of insurance coverage that may be available. Once again, the most efficient method available to the Union is to survey unit employees. There are other areas of administrating the contract where the information we request would be an invaluable aid."

December 12 - Letter from Mayring to Lawrence again denying request for list of names, addresses and telephone number of unit employees, and advising that while the contract makes no mention of unit employees entitlement to paid lunches, that all employees of the hotel, including unit employees, "receive a meal ticket entitling them to a paid lunch." Booklets explaining insurance coverage available to unit employees were also enclosed. First of five security reports (Respondent's Exhibit No. 11(a)) that Swan had been on premises that day advising unit employees, *inter alia*, of a union meeting.[8]

Late December - Limo driver Wolchow first learned his job was covered by a union contract and expressed dissatisfaction with that fact to officials of the Respondent.

1976

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[8]The other reports were made on February 24, April 7, June 21, and July 22, 1976.

January 26 - Lawrence's letter protesting termination of Peggy Wagner and requesting grievance meeting.

February 4 - Union and Respondent representatives met on Wagner grievance.

February 24 - Letter from Valentine to Lawrence confirming telephone conversation of February 12 to the effect that the termination of Wagner "will stand."[9]

Second of five security reports that Swan was on hotel premises. (Respondent's Exhibit No. 11(c)).

April 7 - Third of five security reports that Swan had been on hotel premises. (Respondent's Exhibit No. 11(d)).

June 21 - Fourth of five security reports that Swan on premises. (Respondent's Exhibit No. 11(b)). The report states, *inter alia*, "She [Swan] told me that they had a good turn out at last meeting they had."

July - Union's Lake Tahoe office closed. Thereafter, Lake Tahoe area serviced from Union's Reno office.

July 22 - Fifth security report that Swan on hotel premises. (Respondent's Exhibit No. 11(e)).

Summer (July and August) - Two union meetings with unit employees to discuss new contract proposals.

September - Wolchow requested address and phone number of NLRB from Mayring, and was warned that his proposed petition had to be circulated on his own time. Wolchow called NLRB Regional Office in San Francisco and was informed of the procedures for filing decertification petition. Wolchow testified Valentine told him there were approximately 250 employees in the unit. Valentine testified she told him there were "somewhere in the neighborhood of 280." Wolchow circulated among unit employees a petition

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[9]Lawrence testified the Union had concluded there was no merit to the Wagner grievance.

headed "The undersigned are employees of Sahara-Tahoe Hotel, who do not want to belong to any culinary union." (Respondent's Exhibit No. 5.) Eighty-two signatures are affixed to the document. Wolchow testified he "contacted about 150 people, and out of the 150 I didn't run into anyone that was objecting to getting rid of the Union, and out of that I got 83 [sic] signatures out of 150 . . . . There was some of them that was reluctant to sign the petition" . . . but that no one refused to sign because they wanted to keep the Union in. Wolchow testified he told employees the purpose of the petition was "So we could get out from underneath the contract and do our own bargaining." Respondent learned Union's Lake Tahoe office had been closed.

September 27 - Letter from Union (Bramlet) notifying Mayring of the Union's desire to "change and modify" contract due to expire November 30, 1976.

September 28 - Letter from Aro notifying Union (Bramlet) of Respondent's desire to "modify, amend, or terminate" contract.

September 29 - Wolchow forwarded paper with signatures to 20th Region Office of the Board with following covering letter: "The undersigned employees of Sahara-Tahoe Hotel, do not want to be represented by the Culinary Union and are requesting an election."[10]

October 5 - Letter from Board agent to Wolchow advising that an election could not be held "in the culinary unit" in

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[10]The unit was not spelled out.

view of charges pending before the Board in Washington, D.C.[11]

October 19 - Having learned from Aro that the case then pending before the Board in Washington involved the bar and culinary unit, Wolchow wrote Field Examiner Engler of the Board's San Francisco Regional Office as follows:

> Referring to your letter dated Oct. 5, 1976. The contract that is before the National Labor Relations Board in Washington, D.C. does not cover Transportation, Front Desk, Housekeeping, Reservations, P.B.X., and Hotel Services. This contract runs from December 1, 1973 thru November 30, 1976. The contract disputed covered Food and Beverage Employees and had different dates.

October 21 - Letter from Field Examiner Engler to Wolchow informing him of the Board's procedures for filing a decertification petition, and that in view of the insulated period, one could not be filed until after the collective-bargaining contract expired on November 30.

Letter from Wolchow to Mayring outlining his efforts and correspondence with the NLRB regarding the filing of a decertification petition, and enclosing a copy of the petition containing employee signatures. In Mayring's absence, the letter was directed to Aro.

October 28 (approximately) - Wolchow met with Aro in Mayring's absence. Wolchow informed Aro that he had

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[11]On January 21, 1976, Administrative Law Judge Richard D. Taplitz issued a decision in Case No. 20-CA-9623 recommending dismissal of a complaint alleging violations of Sections 8(a)(1), (3), and (5) of the Act. The Charging Party there, as here, was the Union, and involved a unit of Respondent's bar and culinary workers. Contrary to the administrative law judges's findings, on June 2, 1977, the Board issued its decision in *Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel, supra*, finding the Respondent violated Section 8(a)(5) of the Act. As previously noted, that case is presently before the United States Court of Appeals for the Ninth Circuit on a petition for review and a cross application for enforcement.

contacted 150 employees and that none of them seemed interested in the Union; that they all wanted to withdraw from it; and that he would like some help. Wolchow also told him that the employees who had declined to sign the petition ". . . wanted to get out from the Union, but they just didn't want to be bothered signing the petition, didn't want to get involved in the petition."

Aro discussed the meeting with Mayring and had Valentine check the validity of the 82 signatures on the petition.

At Mayring's request, Valentine determined the employee turnover among the hotel-service employees was 278 percent in 1973, 325 percent in 1974, and 290 percent in 1975.

November 29 - Letter from Lawrence to Aro enclosing two copies of Union's proposed agreement and requesting date, time, and place to commence contract negotiations.

December 16 - Letter from Aro to Lawrence reading as follows:

> This will acknowledge receipt of your letter of November 29, 1975.
>
> As I am sure you are aware, a number of factors have occurred over the past months in connection with your claim to be the bargaining representative of certain of our employees. In view of these considerations, you should know that we do not believe that your organization currently represents a majority of any employees at the Sahara Tahoe Hotel in an appropriate bargaining unit.
>
> For these reasons we respectfully decline your request to commence negotiations.

C. *Findings and Conclusions Regarding Factors Relied on by Respondent for Withdrawing Recognition From the Union*

In its brief, the Respondent enumerates the following factors Mayring relied upon in reaching his conclusion that the Union did not represent a majority of the employees in

the hotel service unit: (1) Valentine's explanation of the trusteeship and other details of the June 1974 meeting of the Reno Employers Counsel,[12] (2) the lack of hotel-service employees support for the Union picket line established at the hotel in 1975; (3) the fact that the majority of the union activity which took place seemed to consist of solicitation of members rather than administration of the contract; (4) the high turnover rate in the unit; (5) the fact only two grievances had been filed in the last 6 years; (6) the changes in terms and conditions of employment without union objection;[13] (7) the fact the Union office had closed; (8) the attempted filing of the decertification petition supported by more than 30 percent of the employees in the unit; (9) statements made by Wolchow that more than 50 percent of the employees in the unit stated they did not want the Union.

The withdrawal of recognition in the hotel-service unit took place in a context free of any other alleged unfair labor practices.[14]

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[12]Valentine testified she learned the Union "was in the process of bankruptcy, that it was going to be put into trusteeship, that Al Bramlet was probably going to be appointed the trustee out of Las Vegas, that there was a possibility of a merger with the Las Vegas Culinary Union and the Reno Local, and . . . that they were going to import union organizers from Las Vegas to assist in boosting the membership in the northern Nevada area."

[13]On September 15, 1974, the Respondent advised the Union that unless the Union objected, it proposed to make certain changes and additions to employee fringe benefits. Also in 1974, the maids requested a meeting with the hotel manager, wherein they requested overtime pay after 5 instead of 6 consecutive days work. By letter dated November 18, 1974, the Respondent informed the Union that it proposed to institute the change if the Union did not object. The Union did not object in either instance.

[14]Pending, however, in the Ninth Circuit Court of Appeals is the petition for review and the cross application for enforcement of the Board's decision, heretofore cited, involving a similar withdrawal of recognition and refusal to bargain issue in the bar and culinary workers unit.

In several recent cases involving either the Respondent herein or other employees in the Lake Tahoe area, the Board considered, and rejected, a number of the factors relied upon by Mayring as the basis for the Respondent's withdrawal of recognition from the Union.

The first factor relied upon by Mayring, that the Union was to be placed under trusteeship because of financial difficulties, was considered by the Board in *Sierra Development Company, d/b/a Club Cal-Neva,* 231 NLRB No. 5. Citing *Nevada Lodge,* 227 NLRB No. 73, the Board stated, at page 6, slip op., ". . . it would be sheer speculation to make an evaluation of employee support for the Union based on the fact the Union was placed in trusteeship by its International because of its poor financial condition." This factor was also considered by the Board in *Finally, Inc., d/b/a Palace Club,* 229 NLRB No. 169. Thus, while the appointment of a trustee, rumors of bankruptcy, and a concerted organizing effort in the northern Nevada area may indeed indicate the Union was in financial trouble, these factors may not be used as a basis for a belief that the Union lacked majority support.

Another factor cited by Mayring was the lack of employee support for the picket line established by the Union in 1975. It is clear from the record that the dispute between the Union and the Respondent at that time was over withdrawal of recognition in the bar and culinary unit, not involved herein. While the record tends to show that Respondent's employees crossed the picket line, the Respondent, upon whom the burden rests to show "objective considerations" sufficient to rebut the presumption of the Union's majority status, has failed to show whether the picket line was intended to cause a work stoppage or was instead intended to exert economic pressure on the Respondent through its customers. Moreover, citing *Palmer Asbestos & Rubber Corp.,* 160 NLRB

723, the Board reiterated its position in *Coca-Cola Bottling Works,* 186 NLRB 1050, 1053 that ". . . the mere failure of employees to support a strike called by their bargaining representative does not give rise to a presumption that these employees have repudiated the Union as their bargaining representative."

The next factor cited by the Respondent in deciding to withdraw recognition from the Union was the fact the majority of the union activity which took place seemed to consist of soliciting members rather than administrating the contract. As noted by the General Counsel, "because Nevada is a right to work state, an ongoing function of any active union is the solicitation of membership." Further, the Board held in the earlier *Sahara-Tahoe* case that:

> . . . even if Respondent had a reasonable basis for believing that a majority of its employees were not union members or did not financially support the Union, such knowledge does not establish a reasonable basis for believing that the Union had lost majority support.[14]

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[14]Moreover, Respondent's attempt to use low union membership as a gauge of union support is especially tenuous because Nevada is a "right to work" state. See *Wald Transfer and Storage Co., and Westheimer Transfer and Storage Co , Inc.,* 218 NLRB 592 (1975), enfd. 535 F.2d 657, (C.A. 5, 1976).

The Board held similarly in *Finally, Inc., d/b/a Palace Club, supra,* and *Nevada Club, Inc., supra.* Moreover, the correspondence between the parties and the testimony of the witnesses shows clearly that the Union's activities were not limited to recruiting new members. In addition to seeking enforcement of the collective-bargaining agreement, Respondent held both formal and informal meeting with employees, visited the Respondent's premises, solicited employee complaints, filed two grievances, discussed bar-

gaining demands with employees, and drafted a contract proposal for the Respondent's consideration.

The Respondent cites the high turnover rate among employees in the unit as a basis for believing the Union lacked majority support, 278 percent in 1973, 325 percent in 1974, and 290 percent in 1975. While high turnover is one circumstance to be considered, the Board has stated in this regard:

> Finally, Respondent relied on the turnover of employees to support its belief that the Union has lost majority support. This argument must be rejected. The Board has ruled, with court approval, that turnover among employees cannot, by itself, be used as a basis for a belief that a union has lost majority support since it is presumed that, absent evidence that would justify a contrary conclusion, new employees will support the Union in the same ratio as those whom they have replaced.[11] Here there is no independent evidence from which it may be inferred that Respondent's new employees did not want the Union to represent them. Therefore, given our findings above, the turnover of employees cannot, by itself, be used as a basis for belief that the Union had lost majority support.

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[11] *Laystrom Manufacturing Co.*, 151 NLRB 1482 (1965); *Washington Manor, Inc., d/b/a Washington Manor Nursing Center (South)*, 211 NLRB 315 (1974).

Dalewood Rehabilitation Hospital, Inc., d/b/a Golden State Habilitation Convalescent Center, 224 NLRB 1618 (1976). Accord, *Sierra Development Company, d/b/a Club Cal-Neva, supra; Finally, Inc., d/b/a Palace Club, supra; Nevada Club, Inc., supra.*

Still another factor in Mayring's decision to withdraw recognition from the Union was the fact only two grievances had been filed by the Union in the last 6 years. Similar

contentions have been rejected by the Board in situations, as here, where Respondent has not demonstrated that grievances existed and were unprocessed by the Union, or that the Union was lax in carrying out its obligations in this regard. *Sierra Development Company, d/b/a Club Cal-Neva, supra; Finally, Inc., d/b/a Palace Club, supra; Nevada Club, Inc., supra.* In fact Director of Personnel Valentine testified the Respondent abided by the terms of the collective-bargaining agreement, a fact not necessarily conducive to the filing of grievances. Further, the record does not show that the Union ever abandoned its representative status; nor has the Respondent pointed to a single instance where the Union failed to represent an employee properly or where an employee expressed dissatisfaction because the Union failed to represent him. *Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel, supra.* In that case the Board stated further that the Union's limited contacts with the Respondent may merely indicate that the Union and Respondent enjoyed a harmonious relationship and that the Union was given no reason to file written grievances.

Lack of employee support for the Union's ability to administer the contract, contends the Respondent, is demonstrated by the fact that in 1974 the maids requested a meeting with the hotel manager, instead of proceeding through their collective-bargaining representative, when they sought overtime pay after 5 instead of 6 consecutive days work. Respondent contends also that the Union's failure to respond to its notification of the resulting proposed changes in overtime pay, and to notification that the Respondent proposed to make changes and additions to the fringe benefits of the unit employees, is evidence of the Union's failure to properly represent the unit employees. Respondent also points out that some of the wages paid unit employees were greater than those negotiated and listed in the contract wage scale.

The simple answer to the latter point is that the collective-bargaining agreement contains a scale for "minimum wages," and under Article V, Section 3, the Respondent retained the right to increase wages.[15] With respect to the employees 1974 act of bypassing the Union and contacting the Respondent's hotel manager directly with respect to overtime pay after 5 instead of 6 consecutive working days, such conduct merely shows, at most, that some employees may not have known that the Union already represented the employees and that the Union already had a contract with the Respondent. As discussed *infra*, while there was a high rate of turnover among the unit employees, there is a presumption that the new employees will be presumed to support the Union in the same ratio as those whom they have replaced. This act, however, could hardly be construed to indicate that they did not want the Union to represent them. See, for example, *Sahara-Tahoe Corporation, supra*, page 5 of slip op. Nor can the Union's failure in 1974 to object to beneficial changes and additions to the fringe benefits be construed as an abandonment of its representatives responsibilities, or as evidence that the Union was either unable to administer the contract or that the employees did not want the Union to represent them. In this regard, it is noted that in 1974 the Respondent recognized the Union's capacity as the representative of all of the unit employees by not instituting the proposed changes until after giving the Union an opportunity to object.

The fact the Union closed its Lake Tahoe office in the summer of 1976 is cited by Mayring as another factor he

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[15]Article V, Section 3 reads:

> Nothing in this contract shall be interpreted to preclude the employer from giving employees an increase in the scale for any class, or individual class, during the period this contract is in full force and effect.

considered when he withdrew recognition from the Union. The record shows the office was initially opened in July 1974; that prior to that time the Union serviced the Respondent's employees from its Reno office; and that after the office closed in the summer of 1976, the Union continued to service the unit employees with representatives from the Reno office. Moreover, on July 22, 1976, Swan was known by the Respondent to have been servicing the unit employees as is evidenced by the security report of that date (Respondent's Exhibit 11(e)). That report recites that Swan went from floor to floor in both the main hotel and annex, and then to the employees cafeteria, advising the maids of a union meeting that evening. This constitutes clear evidence within the knowledge of the Respondent that the Union had not abandoned the unit employees. Moreover, whether the Union chose to service the unit employees from its Reno, South Lake Tahoe or perhaps some other office, is an internal union matter and does not in any way reflect a lack of employee support for the Union.

Another factor which Mayring testified contributed to his decision to withdraw recognition from the Union was the attempt of employee Wolchow to file a decertification petition with the Board supported by slightly more than 30 percent of the unit employees. The document containing 82 employees' signatures was introduced into evidence by the Respondent. Of significance in making a determination whether the document signifies a rejection of the Union as their collective-bargaining representative, is the legend written at the top, which reads: "The undersigned are employees of Sahara-Tahoe Hotel, who do not want to *belong* to any culinary union." (emphasis added.) The Respondent's contention with respect to the meaning of the document fails to distinguish between wanting to be a union member, and desiring to have union representation. *Sierra Development*

Company, d/b/a Club Cal-Neva, supra, page 8 of slip op. As noted heretofore, Nevada is a "right to work" state. Hence, contrary to the Respondent's contention that the document represents a rejection of the Union's representative status, the signatures affixed thereto may more logically be taken as an indication that the employees are voicing their right under state law not to *belong* to a union. In any event, a decertification petition was not in fact filed, nor do the signatures of slightly more than 30 percent of the employees indicate a rejection of the Union by a *majority* of the employees.

The Respondent contends further, however, that the loss of majority representative status is further bolstered by Wolchow's representation that he had been advised by more than 50 percent of the unit employees that they didn't want the Union. It is clear from the record that Wolchow was the only employee with whom Respondent's representatives spoke regarding the employees likes or dislikes regarding the union. Aro testified that Wolchow told him he had talked to "around 150 some - odd people . . . [and] there was very little, if no interest whatsoever in the union; that the people that did sign obviously were definitely against it. And those that didn't — he said they just didn't want it, but were afraid to really get involved with getting their names on a piece of paper." Wolchow testified that he contacted about 150 people and that he "didn't run into anyone that was objecting to getting rid of the union . . . [that] there was some of them that was reluctant to sign the petition," and that no one told him they were refusing to sign because they wanted to keep the Union. Wolchow's version of his conversation with Aro was to the effect that he had "contacted 150 people and that none of them seemed to be interested in the union; that they all wanted to withdraw from it . . . "that the difference between 82 signatures and

150 people with whom he talked, was due to the fact "they just didn't want to be bothered signing the petition, didn't want to get involved in the petition."

In *Dalewood Rehabilitation Hospital, Inc., etc., supra*, at page 1619, the Board acknowledged that while employees statements are some indication of employee dissatisfaction, "they are entitled to little weight to the extent they purport to convey the sentiments of employees other than themselves. Otherwise, a few anti-union employees could provide the basis for a withdrawal of recognition when in fact there is actually an insufficient basis for doubting the union's continued majority." As noted before, Wolchow is the only employee who expressed employee sentiments to the Respondent's executives. His sentiments, insofar as they purport to convey the sentiments of other employees, are entitled to little, if any, weight. When a comparison is made between the wording at the top of the petition signed by the 82 employees, — that "The undersigned . . . employees . . . do not want to *belong* to any culinary union" — with the September 29, 1976 letter that Wolchow sent the Regional Office of the Board enclosing the petition[16] that "The undersigned . . . do not want to be *represented* by the culinary union and are requesting an election" — the danger inherent in giving weight to statements or representations by one employee as to the sentiments of employees other than himself, is all too obvious. It may well be that Wolchow did not want to be *represented* by the Union. However, the signers of the petition indicated that they did not want to *belong* to the Union. The distinction between not wanting to *belong* and not wanting to be *represented* by the Union

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[16]Respondent's Exhibit No. 6.

has been long recognized by the Board and courts, as set forth heretofore.[17]

After considering the evidence in the light of the Board and court precendents cited above, I conclude that the Respondent has failed to show that it had a reasonably based doubt upon objective considerations that the Union did not enjoy majority status at the time it withdrew recognition from the Union, and that by withdrawing recognition and refusing to bargain with the Union on December 16, 1976, the Respondent violated Section 8(a)(1) and (5) of the Act.

IV. Conclusions of Law

1. Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel, Motel, Restaurant Employees & Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All employees employed by the Respondent in its hotel-service operations at its Stateline, Nevada operations, including housekeeping personnel; parking lot attendants; front desk employees; timekeepers; casino porters; and bellmen, excluding casino employees; bartenders and culinary workers; office clerical employees; carpenters; employees in the engineering department; warehouse employees; stage hands; guards and supervisors as defined in the National Labor Relations Act.

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[17]Casting further doubt on the probative value of the petition is the fact that at least some of the employees apparently took it lightly and signed spurious names, e.g. Babe Ruth and Johnny Bench.

4. At all times material herein, the Union has been, and is, the exclusive representative of all employees in the above described appropriate unit for the purposes of collective bargaining.

5. By withdrawing recognition from the Union and by refusing to bargain with the Union as the exclusive bargaining representative of the employees in the unit described above, concerning the wages, hours, working conditions and other terms and conditions of employment of the employees in the unit, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

V. The Remedy

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist and that it take certain affirmative action to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law and the entire record in this proceeding, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:[18]

ORDER

The Respondent, Sahara-Tahoe Corporation, d/b/a

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[18]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Sahara-Tahoe Hotel, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain with Hotel, Motel, Restaurant Employees & Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees:

> All employees employed by the Respondent in its hotel-service operations at its Stateline, Nevada operations, including housekeeping personnel; parking lot attendants; front desk employees; timekeepers; casino porters; and bellmen, excluding casino employees; bartenders and culinary workers; office clerical employees; carpenters; employees in the engineering department; warehouse employees; stage hands; guards and supervisors as defined in the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with Hotel, Motel, Restaurant Employees & Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees, and if an understanding is reached, embody such an understanding in a signed agree-

ment. The unit found appropriate for the purpose of collective bargaining is:

> All employees employed by the Respondent in its hotel-service operations at its Stateline, Nevada operations, including housekeeping personnel; parking lot attendants; front desk employees; timekeepers; casino porters; and bellmen, excluding casino employees; bartenders and culinary workers; office clerical employees; carpenters; employees in the engineering department; warehouse employees; stage hands; guards and supervisors as defined in the National Labor Relations Act.

(b) Post at its Stateline, Nevada, place of business copies of the attached notice marked "Appendix."[19] Copies of the notice on forms provided by the Regional Director for Region 32, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter,in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated: Feb. 1, 1978.

/s/ James S. Jenson
James S. Jenson
Administrative Law Judge

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[19]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

Notice to Employees
Posted by Order of the
National Labor Relations Board
an Agency of the United States Government

After a trial at which all parties had the opportunity to present evidence, the National Labor Relations Board found that we violated the National Labor Relations Act and has ordered us to post this notice.

WE WILL recognize, and upon request, bargain with Hotel, Motel, Restaurant Employees & Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees and if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purposes of collective bargaining is:

> All employees employed by the Respondent in its hotel-service operations at its Stateline, Nevada operations, including housekeeping personnel; parking lot attendants; front desk employees; timekeepers; casino porters; and bellmen, excluding casino employees; bartenders and culinary workers; office clerical employees; carpenters; employees in the engineering department; warehouse employees; stage hands; guards and supervisors as defined in the National Labor Relations Act.

WE WILL NOT refuse or fail to do the foregoing and WE WILL NOT in any like or related manner interfere with,

restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

SAHARA-TAHOE CORPORATION, d/b/a
SAHARA-TAHOE HOTEL
(Employer)

Dated .....
By (Representative) (Title)

JUDGMENT.

United States Court of Appeals, for the Ninth Circuit.

Sahara-Tahoe Corporation, Petitioner, v. National Labor Relations Board, Respondent, and Hotel, Motel, Restaurant Employees and Bartenders Union Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, Intervenor. No. 79-7152.

Before: ANDERSON, FERGUSON and NELSON, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Sahara-Tahoe Corporation d/b/a Sahara-Tahoe Hotel, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns on March 16, 1979, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on June 12, 1980, and has considered the briefs and transcript of record filed in this cause. On November 28, 1980, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby ORDERED AND ADJUDGED by the Court that:

Petitioner, Sahara-Tahoe Corporation d/b/a Sahara-Tahoe Hotel, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain with Hotel, Motel, Restaurant Employees & Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO (hereinafter called the Union), as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees:

All employees employed by the Petitioner in its hotel-service operations at its Stateline, Nevada operations, including housekeeping personnel; parking lot attendants; front desk employees; timekeepers; casino porters; and bellmen, excluding casino employees; bartenders and culinary workers; office clerical employees; carpenters; employees in the engineering department; warehouse employees; stage hands; guards and supervisors as defined in the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with the Union, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees, and if an understanding is reached, embody such an understanding in a signed agreement. The unit found appropriate for the purpose of collective bargaining is:

All employees employed by the Petitioner in its hotel-service operations at its Stateline, Nevada operations, including housekeeping personnel; parking lot attendants; front desk employees; timekeepers; casino porters; and bellmen, excluding casino employees; bartenders and culinary workers; office clerical employees; carpenters; employees in the engineering department; warehouse employees; stage hands; guards and supervisors as defined in the National Labor Relations Act.

(b) Post at its Stateline, Nevada, place of business copies of the attached notice marked "Appendix." Copies of the notice on forms provided by the Regional Director for Region 32, (Oakland, California) of the National Labor

Relations Board, after being duly signed by an authorized representative of the Petitioner, shall be posted by the Petitioner immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to insure that the notices are not altered, defaced or covered by another material.

(c) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this judgment, what steps the Petitioner has taken to comply herewith.

SO ORDERED:

JUDGES:

J. Blaine Anderson

J. BLAINE ANDERSON, CJ

/s/ Warren J. Ferguson

WARREN J. FERGUSON, CJ

/s/ Dorothy W. Nelson

DOROTHY W. NELSON, CJ

Endorsed, Judgment Filed and Entered.

/s/ Richard H. Deane

Richard H. Deane

Clerk

A TRUE COPY,

ATTEST: Richard H. Deane

Clerk

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a hearing at which all parties had the opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice.

WE WILL NOT refuse or fail to do the following and WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize, and upon request, bargain with Hotel, Motel, Restaurant Employees & Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL—CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees and, if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purposes of collective bargaining is:

All employees employed by the Respondent in its hotel-service operations at its Stateline, Nevada operations, including housekeeping personnel; parking lot attendents; front desk employees; timekeepers; casino porters; and bellmen, excluding casino employees; bartenders and culinary workers; office clerical employees; carpenters; employees in the en-

gineering department; warehouse employees; stage hands; guards and supervisors as defined in the National Labor Relations Act.

SAHARA-TAHOE CORPORATION,
d/b/a SAHARA-TAHOE HOTEL
(Employer)

Dated .....
By (Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or complaince with its provisions may be directed to the Board's office, 2201 Broadway, Second Floor, P. O. Box 12983, Oakland, California 96404, Telephone 415—273—6122.

CERTIFICATE OF SERVICE.

United States Court of Appeals, for The Ninth Circuit.

Sahara-Tahoe Corporation, Petitioner, v. National Labor Relations Board, Respondent and Hotel, Motel, Restaurant Employees and Bartenders Union Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, Intervenor. No. 79-7152.

The undersigned certifies that one copy of the Board's proposed judgment in the above captioned matter has this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D.C. this 10th day of December, 1980

No. 80-1452

IN THE

Supreme Court of the United States

MAY 4 1981
ALEXANDER L. STEVAS,
CLERK

October Term, 1980

SAHARA-TAHOE CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, and HOTEL, MOTEL, RESTAURANT EMPLOYEES AND BARTENDERS UNION LOCAL 86, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

SUPPLEMENTAL BRIEF FOR PETITIONER.

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SUPPLEMENTAL BRIEF FOR PETITIONER.

I.
Introduction.

Subsequent to the date on which the Petitioner, Sahara-Tahoe Corporation (hereafter "Hotel" or "Petitioner") filed with this Court its Petition for Writ of Certiorari in the above-captioned case (Docket No. 80-1452, filed February 25, 1981), the Court issued its decision in *Texas Department of Community Affairs v. Burdine*, — U.S. —, 49 U.S.L.W. 4214, 25 EPD ¶31,544, 25 FEP 113, No. 79-1764, March 4, 1981. *Burdine* addressed the issues of shifting burdens of proof and the standard of proof to be required of a defendant in an employment discrimination suit brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (hereafter "Title VII"). These issues

are virtually identical to the issues presented in the Petition herein.[1]

The Petitioner submits that the rationale of *Burdine* should likewise govern in cases of refusal to bargain under the National Labor Relations Act, as amended, 29 U.S.C. §15 *et seq.* (hereafter "NLRA") arising from an employer's good faith doubt of continued union majority status.

II.

This Court's Analysis in *Burdine* of the Evidentiary Burden Placed Upon the Defendant in a Title VII Lawsuit Applies With Equal Force to Cases Arising Under the NLRA.

The *Burdine* case addressed the specific issue of "whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court *by a preponderance of the evidence* that legitimate, non-discriminatory reasons for the challenged employment practice existed." (49 U.S.L.W. 4215) (emphasis supplied). This Court found that the Fifth Circuit Court of Appeals had applied an improper standard of proof

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[1]Neither the Memorandum for the National Labor Relations Board nor the Respondent Union's Brief in Opposition to the Petition address the issues raised by the Petition, but instead attempt to characterize this case as "a quibble regarding the weight of evidence it [the Hotel] presented, and the factual conclusions to be drawn therefrom." (U.Br. 6). Such attempts only highlight the fundamental and important nature of the underlying questions raised by the Petition. Moreover, the opposing briefs further mask the issues by asking this Court to assume that the reasonable good faith doubt standard applied by other circuits in similar cases is equivalent to the "unequivocal evidence" standard applied by the Ninth Circuit. These arguments ignore the plain language of the Ninth Circuit's decision and discount the obvious distinction which the court was making in formulating a standard using language employed by *no* other circuit (nor has the court's language been subsequently adopted by other circuits). Had the Ninth Circuit intended to apply the same standard as these other circuits, it would undoubtedly have used the same language. While the Union and the National Labor Relations Board may choose to ignore or otherwise obscure the important issues raised by the Petition, this Court should not succumb to the same temptation.

to Title VII defendants, in derogation of accepted common law principles and prior Court precedent. In reaching this holding the Court made several crucial observations. At the outset, the Court recognized that "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." (49 U.S.L.W. 4216). The Court then reiterated and amplified the allocation of burdens and order of presentation first set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as follows. The plaintiff has the initial burden to prove by the preponderance of the evidence a prima facie case of discrimination, which "in effect creates a presumption that the employer unlawfully discriminated against the employee." (49 U.S.L.W. 4215).

If the plaintiff can establish the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the employment decision in question. *McDonnell Douglas, supra*, 411 U.S. at 802. The Court stressed that it is the burden of production, not the burden of persuasion, which shifts to the defendant: "It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." (49 U.S.L.W. 4216). The Court further elaborated in footnote 8:

> "This evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the defendant is a traditional feature of the common law. 'The word "presumption" properly used refers only to a device for allocating the production burden.' " (citations omitted).

The Court ruled that the Fifth Circuit had demanded far more than the required simple explanation by the employer of what was done, or the production of evidence of legitimate, nondiscriminatory reasons; instead, the Fifth Circuit "would require the defendant to introduce evidence which,

in the absence of any evidence of pretext, would *persuade* the trier of fact that the employment action was lawful. This exceeds what properly can be demanded to satisfy a burden of production." (49 U.S.L.W. 4217).

Once the defendant has met its burden of production, the burden shifts back to the plaintiff to prove, by a preponderance of the evidence, that the reasons offered by the defendant were a pretext for discrimination. "This burden now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." (49 U.S.L.W. 4216). The Court emphasized that limiting the defendant's evidentiary burden will not unduly hinder a plaintiff meriting relief from demonstrating intentional discrimination.

The Court's analysis parallels the allocation of burdens which should properly be applied in a refusal to bargain case. The National Labor Relations Board (hereafter "Board") and many circuit courts have recognized that,

> "in order to establish that an employer's withdrawal of recognition and refusal to bargain with an incumbent union transgresses Section 8(a)(5) of the Act, the burden of proof is upon the Board to show that the union actually represented a majority of the employees in an appropriate unit. *Machinists Lodges 1746 & 743 v. NLRB*, 135 U.S.App.D.C. 53, 416 F.2d 809 (1969).
>
> "Failure to prove a majority-status of the Union relieves an employer of the duty to bargain. *Maphis Chapman Corp. v. NLRB*, 368 F.2d 298, 303 (4th Cir. 1966)." *NLRB v. Dayton Motels, Inc.*, 474 F.2d 328, at 331 (6th Cir. 1973), *cited in Automated Business Systems v. NLRB*, 497 F.2d 262, at 270 (6th Cir. 1974).

Likewise, the Second Circuit, in *Textile Workers of America v. NLRB*, 386 F.2d 790 (2d Cir. 1967), found that "The Board acted well within its powers in ruling that the general principle whereby the General Counsel carried the burden as to all elements of an unfair labor practice charge,

. . . applied also to the issue of good faith doubt once the employer has raised it, even though this requires the General Counsel to prove a negative.'' 386 F.2d at 792. That the burden of persuasion remains with the General Counsel despite the application of the rebuttable presumption of continued majority status of an incumbent union is supported not only by case law but also by the Federal Rules of Evidence. Rule 301, Presumptions in General in Civil Actions and Proceedings, states the following:

> ''In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.''[2]

Unlike the Title VII discrimination cases, the General Counsel is not required to establish a prima facie case of violation where an employer has refused to bargain with an incumbent union based on a good faith doubt of that union's majority status, but may instead rely on the presumed majority status of a once-certified union. However, as the Board itself stated in *Stoner Rubber Co.*, 123 NLRB 1440 (1959): ''After the lapse of the certification year, the certification creates only a presumption of continued majority. This presumption is rebuttable.'' Thus the presumption acts like the prima facie case to shift the burden of production to the employer. The evidence required of the employer at this stage may establish either (a) actual loss of union ma-

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[2]Section 102.39 of the Board's Rules and Regulations (29 CFR §102.39) provides that, in unfair labor practice proceedings, ''any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States. . . .''

jority,[3] *or* (b) the employer's reasonably grounded good faith doubt supported by objective considerations. *Cf., U.S. Gypsum Co.*, 157 NLRB 652 (1966). The good faith doubt defense is required by the realities of industrial life:

> "Proof of majority is peculiarly within the special competence of the union. It may be proved by signed authorization cards, dues checkoff cards, membership lists, or any other evidentiary means. An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity. *Accordingly, to overcome the presumption of majority the employer need only produce sufficient evidence to cast serious doubt on the union's continued majority status*. The presumption then loses its force and the General Counsel must come forward with evidence that on the refusal-to-bargain date the union in fact did represent a majority of employees in the appropriate unit." *Stoner Rubber Co., supra*, 123 NLRB 1440 (emphasis supplied).

Thus, once the employer has articulated the basis for its good faith doubt, the burden properly shifts back to the General Counsel to prove actual union majority status. The Court in *Automated Business Systems v. NLRB, supra*, agreed with the Board's conclusion in *Stoner Rubber Co., supra*, that such an allocation of burdens did not work an undue hardship on the union: "The General Counsel is in a much better position to prove the majority status of the Union than is the employer." *Automated Business Systems v. NLRB, supra*, 497 F.2d at 271, fn. 8.

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[3]Proof of actual loss of union majority would be a complete defense to a refusal to bargain charge, since it would preclude rebuttal by the General Counsel that, on the refusal-to-bargain date, the union represented a majority of the bargaining unit employees.

In a manner similar to the Fifth Circuit in *Burdine*, the Ninth Circuit in the instant case applied a standard of proof to the Petitioner far in excess of what could properly be required to satisfy the burden of production. By demanding that the Petitioner support its good faith doubt of the union's majority status with "evidence which unequivocally indicates that the union no longer has the majority support of the employees," (Pet. App. 7), the Ninth Circuit has transferred to the Petitioner the burden of persuasion, which should remain with the General Counsel. Just as the defendant in a Title VII lawsuit need only "articulate some legitimate, nondiscriminatory reason" for its action, sufficient to "raise a general issue of fact" (*Burdine, supra*, 49 U.S.L.W. at 4215, 4216), so should Petitioner in the instant case have been required merely to "produce sufficient evidence to cast serious doubt on the union's continued majority status." (*Stoner Rubber Co., supra*). Instead, the Ninth Circuit required Petitioner to persuade the court with evidence to "unequivocally indicate that the union support had declined to a minority." (Pet. App. 6). Thus, the Petitioner was required, in effect, to provide evidence of actual loss of union majority, which would be the only evidence which would "unequivocally indicate" a lack of majority support for the union; such evidence is, as a practical matter, virtually impossible for an employer to obtain. *Stoner Rubber Co., supra; Automated Business Systems v. NLRB, supra*. The Ninth Circuit thereby not only improperly shifted the burden of persuasion to the Petitioner, but also insured that the Petitioner would be unable to sustain the burden placed upon it. Consequently, without introducing one iota of evidence of majority status, the union was permitted to prevail by exclusive reliance on the presumption of continued majority, which has been made irrebuttable by the Ninth Circuit's standard of proof.

This Court in *Burdine* also found that the Fifth Circuit erred by requiring the defendant to prove, in a discrimination

case, that the person hired or promoted was more qualified than the plaintiff. The Court held that such a demand invited potential violation of Title VII by requiring preferential treatment of minorities and females:

> "The views of the Court of Appeals can be read, we think, as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference." 49 U.S.L.W. 4217.

A similar error was committed by the Ninth Circuit in the instant case. The Court misconstrues the statutory duty of an employer to bargain with the majority representative of its employees by requiring an employer who doubts the majority status of an incumbent union to prove actual loss of majority. It is the union, not the employer, who is required to prove representative majority status; the employer who bargains exclusively with a minority union risks violation of section 8(a)(2) of the Act, which makes it an unfair labor practice for an employer to contribute support to any labor organization. The Ninth Circuit obligates a preference for incumbent unions, perpetuated by the presumption of continued majority status, which is unwarranted under the Act, and may ultimately mandate violation of the law.

III.
Conclusion.

Just as this Court has recognized the necessity for a clear articulation of the burdens allocable to parties in a Title VII action, so must the Court acknowledge the importance of a similarly clear standard in refusal to bargain cases under the NLRA. The Ninth Circuit has placed a clearly erroneous

burden upon the Petitioner and similarly situated employers. The rectification of this error and an articulation of the proper standard to be applied in such cases merit the immediate attention of this Court.

Dated: May 1, 1981.

Respectfully submitted,

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No. 80-1452

In the Supreme Court

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United States

OCTOBER TERM, 1980

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INTERNATIONAL UNION, AFL-CIO,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

Whether substantial evidence supports the Board's finding that petitioner had not established a reasonably grounded doubt of the union's majority status.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-7) has not yet been officially reported. The Decision and Order of the National Labor Relations Board is reported at 241 NLRB No. 12.

STATEMENT OF THE CASE

The Memorandum for the National Labor Relations Board in Opposition is an accurate and succinct statement of the case.

ARGUMENT

I

THE PETITION REITERATES ARGUMENTS ALREADY MADE TO AND DENIED BY THIS COURT

The Court should be familiar with the petition herein, as it repeats arguments already presented by petitioners in *N.L.R.B. v. Tahoe Nugget, Inc. d/b/a Jim Kelley's Tahoe Nugget* and *N.L.R.B. v. Nevada Lodge*, 584 F.2d 293 (9th Cir., 1978) *cert. denied* 442 U.S. 921, *reh. denied* 444 U.S. 887 (1979), *Sahara-Tahoe Corporation v. N.L.R.B.*, 581 F.2d 767 (9th Cir., 1978), *cert. denied* 442 U.S. 917, *reh. denied* 444 U.S. 888 (1979), and most recently, *Silver Spur Casino v. N.L.R.B., et al.*, 623 F.2d 571 (9th Cir., 1980), petition for certiorari pending, United States Supreme Court No. 80-660, and *Barney's Club, Inc. and Sparks Nugget, Inc. d/b/a John Ascuaga's Nugget v. N.L.R.B., et al.*, 623 F.2d 571 (9th Cir., 1980) petition for certiorari pending, United States Supreme Court No. 80-1083.

The Court's decisions to deny certiorari in the above cases should also apply here. The salient facts are virtually identical in all the cases. The "conflict" among the circuits which petitioner seeks to create has never existed. The Court below merely found that petitioner made an insufficient factual showing to establish a reasonable doubt of the Union's majority status, applying legal standards endorsed in other circuits and by this Court. (Pet. App. 2-3, 6-7). Petitioner's factual showing simply should not burden the Court's powers to review federal labor policy.

II

NO CONFLICT IS CREATED BY THE COURT'S HOLDING THAT PETITIONER FAILED TO ESTABLISH A REASONABLY GROUNDED DOUBT OF THE UNION'S MAJORITY STATUS

Petitioner's premise is that a conflict exists among the courts of appeals regarding the standards for justifying an employer's refusal to bargain with an incumbent union. (Pet. 11). In fact, the standards are clear, as petitioner admits in other portions of its petition. (Pet. 8). First, the Board and appellate courts have uniformly held that an employer which withdraws recognition from an incumbent union must overcome the presumption of continued majority status of the union by establishing that a majority of the employees in fact no longer desire to be represented by the union, or that the employer had a reasonably grounded doubt, entertained in good faith, of the union's majority status at the time of the refusal to bargain (Pet. 8, see also *Terrell Machine Co. v. N.L.R.B.*, 427 F.2d 1088 (4th Cir., 1970) and cases therein). This Court has recognized the validity of that presumption in *N.L.R.B. v. Burns International Security Services*, 406 U.S. 272, 279 n. 3. Second, the Board and courts uniformly require the presumption to be overcome by clear and convincing objective facts showing a reasonably grounded doubt of the union's majority status. *N.L.R.B. v. Tahoe Nugget, Inc., supra,* 584 F.2d 293, 297; *Orion Corp. v. N.L.R.B.*, 515 F.2d 81, 85 (7th Cir., 1975); *Retired Persons Pharmacy v. N.L.R.B.*, 519 F.2d 486, 489-490 (2nd Cir., 1975); *J. Ray McDermott & Co., Inc. v. N.L.R.B.*, 571 F.2d 850, 858 (5th Cir., 1978) *cert. den.* 439 U.S. 893 (1978). Here, petitioner

sought to justify its refusal to bargain solely on the basis that it had a reasonable doubt of majority support for the Union at the time of the refusal to bargain. The court below correctly found the petitioner simply did not adduce any facts supporting a reasonable doubt.

Petitioner's real argument is with the objective standard it must meet to establish its reasonable doubt. Petitioner contends that ambiguous and equivocal evidence should be sufficient to support a "good faith" doubt, even if otherwise insufficient to show a reasonable and objective doubt. However, evidence of subjective good faith is not the test this Court has endorsed. *N.L.R.B. v. Burns International Security Services, supra,* 406 U.S. 272; *N.L.R.B. v. Tahoe Nugget, Inc., supra,* 584 F.2d 293, 299-300; *Sahara Tahoe Corporation v. N.L.R.B., supra,* 581 F.2d 767.

In arguing that the court departed from standards applied in other circuits, petitioner takes the decision below out of context, and mischaracterizes decisions of other courts.

A. The Board and Court Adhered to the Appropriate Evidentiary Standard

No court of appeals permits an employer to base a refusal to bargain on ambiguous or equivocal evidence. Nor may the presumption be rebutted by presenting a shopping list of equivocal factors and claiming that the cumulative effect of the evidence was ignored. *N.L.R.B. v. Tahoe Nugget, Inc., supra,* 584 F.2d 293, 304-305; *Sahara Tahoe Corp. v. N.L.R.B., supra,* 581 F.2d 767, 771-772. The requirement to produce unequivocal evidence as the factual predicate

for refusing to bargain has been variously phrased,[1] but the type of evidence deemed acceptable has not. In each case cited by petitioner in which the reasonable doubt defense was upheld, the employer established at least one factor which unequivocally indicated a decline in union support.[2] Conversely, the reported decisions manifest that employers' failures to rebut the presumption were attributable to ambiguous, speculative evidence. The quality of proof required to rebut the presumption is objective and equivocal and is not sustained by any showing of subjective good faith.

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[1]The quality of evidence required has been termed "clear, cogent and convincing." See *N.L.R.B. v. Tahoe Nugget, Inc., supra,* 584 F.2d 293, 297; *Orion Corp. v. N.L.R.B., supra,* 515 F.2d 81, 85; *Retired Persons Pharmacy v. N.L.R.B., supra,* 519 F.2d 468, 489; or, "factors [which] point unequivocally to a decline in union support among petitioner's employees"; *Sahara Tahoe Corp. v. N.L.R.B., supra,* 581 F.2d 767, 771; *N.L.R.B. v. Tahoe Nugget, Inc., supra,* 584 F.2d 293, 305; "objective evidence", *J. Ray McDermott v. N.L.R.B., supra,* 571 F.2d 850, 858; *Terrell Machine Co. v. N.L.R.B., supra,* 427 F.2d 1088, 1090; *N.L.R.B. v. Rogers I.G.A., Inc.,* 605 F.2d 1164, 1166 (10th Cir., 1979); or "rational basis in fact for doubts of majority status" *N.L.R.B. v. King Radio Corp.,* 510 F.2d 1154, 1156 (10th Cir., 1975) *cert. den.* 423 U.S. 839 (1975).

[2]See cases cited at Pet. 12-14. In *Ingress-Plastene, Inc. v. N.L.R.B.,* 430 F.2d 542 (7th Cir., 1970) the union president admitted he represented only 49 of the 155 employees in the unit. In *Royal Typewriter Co. v. N.L.R.B.,* 533 F.2d 1030 (8th Cir., 1970) and *Automated Business Systems v. N.L.R.B.,* 497 F.2d 262 (6th Cir., 1974) a valid decertification petition was filed, signed by more than 30% of the employees, in addition to other objective factors; In *Machinist Lodges 1746 and 143 v. N.L.R.B.,* 416 F.2d 809, (D.C. Cir., 1969) *cert. denied* 396 U.S. 1058 (1970) the union admitted to the employer that it lacked majority support in *N.L.R.B. v. Randle-Eastern Ambulance Services, Inc.,* 584 F.2d 720 (5th Cir., 1978) there was an admitted decrease in union supporters combined with other "solid evidence."

The Board and courts properly recognized that an exacting standard of proof insures that the focus of the good faith doubt defense is empirical and objective. By requiring that the employer be aware of and prepared to demonstrate facts manifesting a lack of union support, the Board and courts guarantee that an established bargaining relationship will not be disrupted based on the employer's subjective state of mind or speculative attitude. The policy reasons for that standard are equally well established. (*N.L.R.B. v. Tahoe Nugget, supra,* 584 F.2d 293, 301-302).

Petitioner has hardly unearthed a conflict among the courts of appeals. It cites no case in which subjective and speculative evidence was deemed sufficient to rebut the presumption of continued majority support. In essence, petitioner's argument amounts to a quibble regarding the weight of the evidence it presented, and the factual conclusions to be drawn therefrom. Such a dispute does not merit review by this Court. *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 490-491 (1951).

B. Petitioner's Evidence was Accurately Assessed

The decision below followed the holdings of the Board and court in the other "casino cases" (Pet. App. 2), where employers consistently advanced the same evidence to justify their refusal to bargain with the Union,[3] and the Board and court found it to be equivocal, speculative and ambiguous. (Pet. App. 2, *N.L.R.B. v. Tahoe Nugget, Inc., supra,* 584 F.2d 293). Indeed, the evidentiary showing was

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[3]Those "factors" included employee discontent with the Union, high employee turnover, low union membership, union financial difficulty, and a vigorous union membership drive. (Pet. App. 2).

compared to "the Cheshire cat's grin—nothing behind it." *Sahara Tahoe Corp. v. N.L.R.B., supra,* 581 F.2d 767, 772.

The only additional factor petitioner introduced to bolster its showing here was a "petition"[4] indicating that some employees no longer wanted to be *members* of the Union. But union membership is not equivalent to union support, particularly in a right-to-work state like Nevada. *Sahara Tahoe Corp. v. N.L.R.B., supra,* 581 F.2d 767, 772; *N.L.R.B. v. Tahoe Nugget, Inc., supra,* 584 F.2d 293, 305; *N.L.R.B. v. Cornell of California,* 577 F.2d 513, 515-516 (9th Cir., 1978); *J. Ray McDermott & Co. Inc. v. N.L.R.B., supra,* 571 F.2d 850, 859. Thus, petitioner offered the Board and court absolutely no reason to reach a result different from the other "casino cases."[5] As with those cases, certiorari should be denied here.

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[4]This "petition" was administratively determined by the Board not to be a valid decertification petition, pursuant to 29 U.S.C. § 159(c)(1)(a)(ii).

[5]Petitioner's contention that the Board and courts required "unequivocal proof" of the loss of union majority is hyperbole. (Pet. 10). Clearly the Board and court, is conforming with other circuits, required only some objective, unequivocal indication that majority support for the union did not exist (Pet. App. 7). Moreover, petitioner's evidence was considered on a cumulative basis, found deficient even on that basis. (Pet. App. 2-3), *NLRB v. Tahoe Nugget, Inc., supra,* 584 F.2d 293, 304-305, 308).

CONCLUSION

For all of the above reasons, as well as for the reasons stated in the Memorandum for the National Labor Relations Board in Opposition, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 80-1452

APR 1 1981
ALEXANDER L. STE
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In the Supreme Court of the United States

OCTOBER TERM, 1980

SAHARA-TAHOE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Petitioner operates a hotel, bar, restaurant and casino in Stateline, Nevada (Pet. App. 13). In May 1970, the Hotel, Motel, Restaurant Employees and Bartenders Union Local No. 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO ("the Union") was certified as the collective bargaining representative of petitioner's service employees (Pet. App. 14). Thereafter, in 1970 and 1973, petitioner and the Union entered into successive three year collective bargaining agreements (Pet. App. 14). In September 1976, the Union notified petitioner that it desired to modify the contract that was due to expire November 30, 1976. Petitioner indicated its willingness to meet with the Union for that purpose. On November 29, the Union sent petitioner its contract proposals with a request that bargaining negotiations commence. On December 16, petitioner wrote to the Union expressing doubt that the Union "currently represents a majority of any employees at the Sahara-

Tahoe Hotel in an appropriate unit" and refusing to bargain for that reason (Pet. App. 14-15).

The Board, upholding the decision of the administrative law judge, found that petitioner did not have a sufficient objective basis for reasonably doubting the Union's continued majority status and that therefore petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by withdrawing recognition from and refusing to bargain with the Union (Pet. App. 8-9, 35).

In rejecting petitioner's assertion of a good faith doubt of the Union's continuing majority status, the administrative law judge noted that petitioner relied on a number of factors that previously had been considered and rejected by the Board when raised by petitioner and a number of other casino owners in the Lake Tahoe area with regard to the Union's status as majority representative of their kitchen and culinary employees (Pet. App. 27).[1]

The administrative law judge also rejected petitioner's reliance on a petition that employee Wolchow attempted to file with the Board in an effort to decertify the Union. The judge explained (Pet. App. 32-33):

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[1]The factors rejected by the Board include the Union's having been placed under trusteeship, the Union's activity in attempting to increase its membership, the lack of grievance activity by the Union, high employee turnover, and closure of the Union's Lake Tahoe office. These factors were also asserted in *NLRB* v. *Silver Spur Casino*, 623 F. 2d 571 (9th Cir. 1980), petitions for cert. pending, sub nom. *Silver Spur Casino* v. *NLRB*, No. 80-660 (filed Oct. 11, 1980) and *Barney's Club, Inc.* v. *NLRB*, No. 80-1083 (filed Jan. 2, 1981), and are discussed in the Board's briefs in opposition to the petitions in those cases. (We are sending counsel for petitioner copies of our briefs in opposition in *Silver Spur* and *Barney's Club*.) See also *Sahara-Tahoe Corp.* v. *NLRB*, 581 F. 2d 767 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979); *NLRB* v. *Tahoe Nugget, Inc.*, 584 F. 2d 293 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); *NLRB* v. *Sierra Development Co.*, 604 F. 2d 606 (9th Cir. 1979); *NLRB* v. *Carda Hotels, Inc.*, 604 F. 2d 605 (9th Cir. 1979).

> Of significance in making a determination whether the document signifies a rejection of the Union as their collective-bargaining representative, is the legend written at the top, which reads: "The undersigned are employees of Sahara-Tahoe Hotel, who do not want to *belong* to any culinary union." (emphasis added.) The [petitioner's] contention with respect to the meaning of the document fails to distinguish between wanting to be a union member, and desiring to have union representation. * * * Nevada is a "right to work" state. Hence, contrary to the [petitioner's] contention that the document represents a rejection of the Union's representative status, the signatures affixed thereto may more logically be taken as an indication that the employees are voicing their right under state law not to *belong* to a union. In any event, a decertification petition was not in fact filed, nor do the signatures of slightly more than 30 percent of the employees indicate a rejection of the Union by a *majority* of the employees.

The administrative law judge added that petitioner's reliance on Wolchow's statement that 150 employees told him that they all wanted to withdraw from the Union was not probative of actual employee sentiment. The judge noted that "Wolchow is the only employee who expressed employee sentiments to [petitioner's] executives. His sentiments, insofar as they purport to convey the sentiments of other employees, are entitled to little, if any, weight" (Pet. App. 34).

The Board ordered petitioner, *inter alia*, to bargain with the Union (Pet. App. 8-9, 36-38).

2. The court of appeals, finding that substantial evidence supported the Board's decision, enforced its order (Pet. App. 1-7). The court noted that in its "prior 'casino cases' " (see note 1, *supra*), it had agreed with the Board that

evidence of "employee discontent with the union, high employee turnover, low union membership, financial difficulties of the union, and a vigorous membership drive * * * standing alone or cumulatively, presented only an ambiguous inference that the union had lost its majority support" (*id.* at 2-3). The court further agreed with the Board that the decertification petition was ambiguous and therefore "did not, by itself or together with the other evidence presented, unequivocally indicate that the union support had declined to a minority" (*id.* at 6).

3. Petitioner contends that the court of appeals erred in upholding the Board's position that petitioner did not have a good faith, reasonable doubt of the Union's continued majority support of its service employees. Petitioner essentially contends (Pet. 11) that the court of appeals applied a more stringent standard than have the other circuits in assessing the reasonableness of an employer's basis for asserting a good faith doubt and that the court below failed to consider the cumulative effect of the evidence. There is no merit to these contentions.

Petitioner focuses (Pet. 11-12) on the court of appeals' statement that the evidence did not "unequivocally indicate that the union support had declined to a minority" (Pet. App. 6-7), and points to opinions in other circuits describing the reasonable doubt test by such phrases as "serious doubt," "rational basis" and "clear and convincing evidence" (Pet. 12-13). However, the court's use of the term "unequivocal" was in response to the fact that petitioner's evidence was ambiguous because it indicated only that the employees might not want to be *members* of the Union rather than that they did not want the Union to be their bargaining representative. In none of the cases upon which petitioner relies did the courts accept evidence of a decline

in interest in union membership, rather than union representation, as adequate to support a good faith doubt of continuing majority status.[2]

Moreover, contrary to petitioner's assertion (Pet. 14-19), the court of appeals did consider the cumulative weight of the evidence (Pet. App. 3, 6). Thus, the only issue actually presented here is whether substantial evidence supports the Board's finding of insufficient objective factors to support a good faith doubt of loss of majority status. That factual issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

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[2]In *NLRB* v. *Frick Co.*, 423 F. 2d 1327, 1333-1334 (3d Cir. 1970), the court agreed with the Board that the employer could not establish a good faith doubt based on the fact that a number of employees had abandoned a strike. In *Terrell Machine Co.* v. *NLRB*, 427 F. 2d 1088, 1090 (4th Cir. 1970) and *Retired Persons Pharmacy* v. *NLRB*, 519 F. 2d 486, 490 (2d Cir. 1975), the courts agreed with the Board that evidence of less than majority union membership could not support a good faith doubt; and, in *J. Ray McDermott & Co.* v. *NLRB*, 571 F. 2d 850, 859 (5th Cir.), cert. denied, 439 U.S. 893 (1978), the court rejected lack of organizational strength and turnover as grounds for establishing a sufficient doubt. In *Lodges 1746 & 743, Machinists Union* v. *NLRB*, 416 F. 2d 809, 812-813 (D.C. Cir. 1969), the union admitted that it lacked majority support. *Automated Business Systems* v. *NLRB*, 497 F. 2d 262, 265 (6th Cir. 1974) and *Royal Typewriter Co.* v. *NLRB*, 533 F. 2d 1030, 1036 (8th Cir. 1976), involved decertification petitions not couched, as here, in terms of union membership. *NLRB* v. *Randle-Eastern Ambulance Services, Inc.*, 584 F. 2d 720, 728-729 (5th Cir. 1978), involved a strike in which the employer had been informed by a union representative that a large number of the strikers would not be returning to work. *NLRB* v. *West Sand & Gravel Co.*, 612 F. 2d 1326 (1st Cir. 1979), did not involve the issue of whether the employer had a good faith doubt, but whether, on the facts of that case, the presumption of majority status was applicable. *Ingress-Plastene, Inc.* v. *NLRB*, 430 F. 2d 542 (7th Cir. 1970) and *W & W Steel Co.* v. *NLRB*, 595 F. 2d 934 (10th Cir. 1979), are discussed in the Board's briefs in opposition in *Silver Spur* (at 8 n.3, 9) and *Barney's Club* (at 8-9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1981

DOJ-1981-04